88-746

Supreme Court, U.S.
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CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

HENRY ADAMS, ET AL.,

Petitioners,

v.

THE BUDD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals incorrectly applied precedent of this court established in Vaca v. Sipes and issued an opinion which conflicted with the other circuits as to the standard necessary to show that the union breached its duty to fairly represent its members.

2. Whether the panel decision of the Seventh Circuit Court of Appeals incorrectly applied precedent of that court and violated the doctrine of stare decisis by its failure to follow binding precedent from this court and from within the circuit in holding that repeated violation by the company of an employee's preferential hiring rights, coupled with repeated refusals by the union to process his/her seperate grievances, could not amount to a continuing violation of Section 301 which would render timely and actionable violations occurring more than six months prior to the filing of that employee's action so long as the latest of such repeated violations occurred within six months of the time the action was fileo.

LIST OF PARTIES

Petitioners:

Henry C. Adams, Jr., Willie Ballard, Robert Bernal, George Berry, Willie Bingham, Joyce Clark, Willie J. Cornelius, Joseph Cruz, Louis Cruz, Jr., Michael Dawson, Howard Donald, Lillie K. Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, Jerome Nedoff, Melvin R. Page, John W. Perkins, Willie H. Smith, Malcolm Tucker, Jerome Tyron, Robert Weems, Sr., Emanuel Williams, Leroy Williams, Milton Wilson and Alfred D. Volk.

Respondents:

The Budd Company, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and Its Local No. 1122

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October Term, 1988

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Petitioners,

v.

THE BUDD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioners petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit (App. A., infra) denying Petitioners' Petition for Rehearing is not reported. The judgment and opinion of the United States Court of Appeals for the Seventh Circuit (App. B, infra) is not reported. The order of the District Court denying Petitioners' Motion To Amend And/Or Alter Judgment (Appx. C, infra) is not reported. The judgment and order of the United States District Court for the Northern District of Indiana, Hammond Division, (App. D, infra) is not reported.

JURISDICTION

The Order of the United States Court of

Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on May 5, 1988. The Order of the United States Court of Appeals oenying the Petition for rehearing was entered on July 6, 1988. The jurisciction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act ("Section 301"), 29 U.S.C. Section 185(a) provides in part as follows:

"(b) Responsibility for acts of agent-Entity for purpose of suit-Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agenty. Any such labor organization may sue or be sued as an entity and in

behalf of the employees whom it represents in the courts of the United States. Any money Judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT OF THE CASE

This is an action arising under and jurisdiction is conferred by, Section 301 of the Labor/Management Relations Act of 1947, as amended, 61 Stat. 186, as amended 29 U.S.C. Section 185, as amended, hereinafter, the (LMRA). [Appx. 1, pg. 2]

The Plaintiffs, each and all, are former employees of the Budd Company, Gary, Indiana facility, and former members of Local 1122 of the International Union, UAW. The individual plaintiffs are as follows: Henry C. Adams, Jr., Willie Ballard, Robert Bernal, George Berry,

Willie Bingham, Joyce Clark, Willie J. Cornelius, Joseph Cruz, Louis Cruz, Jr., Michael Dawson, Howard Donald, Lillie K. Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, Jerome Nedoff, Melvin R. Page, John W. Perkins, Willie H. Smith, Malcolm Tucker, Jerome Tyron, Robert Weems, Sr., Emanuel Williams, Leroy Williams, Milton Wilson and Alfred D. Volk. [Appx. 1, pg. 3]

The Defendant Budd Company was a Delaware corporation headquartered in Detroit, Michigan and engaged in the manufacturing of automobile and truck body components. The Budd Company had facilities at Hunting Park Plant, Red Lion Plant, Johnson City, Tennessee Plant, Quinton, Michigan Plant, Detroit, Michigan Plant, and the Ashland, Ohio Plant. [Appx.1, pg. 3]

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is a labor organization that represented employees at all the Budd Company facilities. [Appx. 1, pg. 4]

Local 1122 of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, was a labor organization of employees, affiliated with the International Union, and negotiated and entered into collective bargaining agreements on behalf of the covered employees of the Budd Company, Gary facility. [Appx. 1, pg. 4] On or about February 2, 1980, the Budd Company, on behalf of all its plants, and the International Union, UAW, and its affiliated locals, including Local 1122, entered into a collective bargaining agreement, covering wages hours,

and other terms and conditions of employment. [Appx. 1, pg. 4] In contemplation of closing its Red Lion and Gary facilities, the Budd Company and the International Union, UAW negotiated a preferential hiring agreement (PHA). [Appx. 1, pg. 15] This agreement provided that UAW/covered employees who are displaced from employment because of the closing of a plant covered by the National Agreement, be given preference over other applicants. [Appx. 1, pg. 9] The Budd Company, Gary facility, ceased production in October of 1982, but the maintenance functions continued until December of 1982. [Appx. 8, pg. 87]

The Plaintiffs were all laid off at various times between the years of 1979 and 1980 from the Budd Company and were never recalled. [Appx. 22, pg. 194] There was nothing in the National Agreement that

prevented a former employee from reapplying after a rejection or inaction of a previous application. In fact, the application expired after six (6) months, which made it necessary to reapply if the applicant still wanted to be considered for employment. Numerous times after their layoffs, the Plaintiffs sought employment at various facilities of the Budd Company by mailing applications and/or contacting various personnel offices.

In July of 1982, the International Union, UAW and the Budd Company entered into a letter of understanding for the processing of applications under the preferential hiring clause of Document 12. [Appx. 11, pg. 124] The contents of this letter was never communicated to the Plaintiffs. Subsequently, on March 27, 1984, the Defendant Budd Company and the International Union, UAW entered into an

appeal procedure for those laid off employees who had sought employment under the preferential hiring clause and had been rejected. Again this procedure was never communicated to the Plaintiffs. The letter provided that the appeal must be made in writing by the UAW Budd Department to the Company's Manager of Labor Relations within thirty (30) calendar days after receipt of denial by the employee. Next, the company's Corporate Manager of Labor Relations, or his designee, will provide a written response to the appeal within fifteen (15) calendar days after receipt of such appeal. Such appeal shall be considered settled on the basis of the company's written response unless within thirty (30) calendar days the case is appealed to the permanent arbitrator appointed under the National Agreement. [Appx. 11, pg. 126-127] The Budd Company

and the International Union, UAW never processed an appeal and grievance as outlined in the letter of March 27, 1984 from William Kroger to James Ellis. [Appx., pg. 88]

In the latter part of 1983 and the early part of 1984, the Plaintiffs formed an organization called "The Committee of Former Budd Employees." [Appx. 24, pg. 218] The Committee sent letters to Mr. Owen Bieber, the President of the International Union, UAW, requesting assistance in their plight and requesting that the International Union, UAW grieve the Budd Company's refusal to hire them. [Appx. 25-55]

In February of 1985, all of the Plaintiffs wrote letters of application to each of the Budd Company facilities. [Appx. 8, pg. 85] The Budd Company did not have a practice or policy of sending

letters to all applicants who were rejected, advising them of their appeal rights. [Appx. 8, pg. 87], and did not advise Plaintiffs in this instance.

During the time that the Plaintiffs were seeking employment from the Defendant Budd Company at its various facilities, Defendant Buod Company was continuing to hire new employees. [Appx. 24, pg. 221]

Finally, in February of 1985, each of the Plaintiffs wrote letters of application to the Budd Company seeking employment. [Appx. 8, pg. 85], to which the company never responded. Subsequently, in April of 1985, the Plaintiffs wrote individual letters to the International Union, UAW requesting the filing of a grievance on the Budd Company's failure to hire them. No action was taken on these letters requesting that grievance action be taken.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the duties and responsibilities of labor organizations to represent their members. It presents for review Seventh Circuit's interpretation of Section 301 and the duty owed, which interpretation conflicts with that of numerous other circuits. The lack of uniformity among the circuits on this question results in more or less protection of one's statutory rights to be fairly represented by one's union depending on the fortuitousness of one's geographical location. Additionally, the opinion of the Seventh Circuit in this case unreasonably restricts the continuing violation theory in a manner inconsistent with applicable precedent.

A. THE SEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY APPLIED PRECEDENT OF THIS COURT ESTABLISHED IN VACA VS. SIPES AND ISSUED AN OPINION WHICH CONFLICTED WITH OTHER CIRCUITS AS TO THE STANDARDS NECESSARY TO SHOW THAT THE UNION BREACHED ITS DUTY TO FAIRLY REPRESENT ITS MEMBERS.

In the Seventh Circuit, it is clear that the union has a duty to represent employees fairly, but they do not have a duty to be non-negligent in their representation of employees.

In 1967, this court set the standard for evaluating duty of fair representation claims involving grievance-handling in the case of Vaca vs. Sipes, 386 U.S. 171 (1967). In that case, the employer discharged a worker after the company's doctor judged that the worker's high blood pressure rendered him unfit for work. The union represented the worker through the preliminary steps of the grievance procedure. The union decided not to

arbitrate the grievance based on the fact that the employee had been sent to another doctor who supported the company's position. The employee filed a Section 301 lawsuit, claiming that he had a right to arbitrate the merits of his grievance. This court held that the employee' claim was of a breach of the duty of fair representation, but the evidence, which at most, showed that the determination of medical unfitness was incorrect, and which would not support a finding of bad faith or arbitrariness/fail to sustain the claim: The court further stated:

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith . . ."

This tripartite standard has been generally accepted as the definitive formulation of the fair representation

standard in the contract administration context. It is noted that this standard is disjunctive. The court went on to say: "That we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. (Id. at 190)

- Four years later in Amalgamated Association of Street Electrical Railway and Motor Coach Employees vs. Lockridge, 403, U.S. 274, 299-301 (1971). This court in dicta inferred that the Vaca standard required a showing of "fraud, deceitful action or dishonest conduct" on the part of the union.

Then some years later this court in Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554, 568-69 (1976), and Del Costello vs. International Bhd. of Teamsters, 462 U.S. 151, 164 (1983), indicated that a

union breaches the duty of fair representation when it handles a grievance in a "discriminatory, dishonest, arbitrary or - perfunctory fashion". This court completely ignored Lockridge, and the requirement of "fraud, deceitful action or dishonest conduct".

The Seventh Circuit in Hoffman vs. Lonzo, Inc., 658 F. 2d 519, (1981); Graf vs. Elgin, Joliet and Eastern Railway, Co., 697 F. 2d 771 (1983); Superczynski vs. P.T.O. Services, Inc., 706 F. 2d 200 (7th Cir. 1983); Camacho vs. Ritz/Carlton Water Tower, 786 F. 2d 242 (7th Cir. 1986), cert. denied, 106 Sup. Ct. 3282 (1986); Grant vs. Burlington Industries, 832 F. 2d 76 (7th Cir. 1987), specifically indicated "Courts may enforce duty of union to represent employees only when union conduct breaching that duty is intentional, invidious and

directed at the employee."

The Seventh Circuit in a classic example of union negligence in Graf, supra occurred with the following factual background: Mr. Graf was discharged for omitting a portion of his employment history on his job application. He filed a grievance, which was denied at the initial level. He then asked his union representative to appeal. The union representative agreed to proceed on the grievance, filled out the form and put it in his pocket. The appeals process elasped after a sixty (60) day expiration of time. The union man later found the grievance in his pocket. The Seventh Circuit held that the carelessness of the union representative did not give rise to a claim of the breach of the duty of fair representation: "Negligence, even gross

negligence . . . is not enough; and, obviously intentional misconduct may not be inferred from negligence, whether simple or gross . . ."

The Seventh Circuit's approach in Graf, supra, Hoffman, supra, Superczynski, supra, Camacho, supra, Grant, supra, and this case, conflicts with other circuits.

For example, in Dutrisac vs. Caterpillar Tractor Company, 749 F. 2d 1270 (9th Cir. 1983), the tractor company fired the employee for allegedly excessive absenteeism. The employee claimed that the discharge was racially motivated and filed a grievance. The union decided to take the case to arbitration, but the union representative made a mistake in calculating a date on which the formal request for arbitration was due. The arbitrator dismissed the grievance as

untimely. The employee then sued the union claiming that the mis-handling of the grievance breached a duty of fair representation. The Court of Appeals for the Ninth Circuit upheld the claim, even though it specifically acknowledged that there was not evidence of intentional misconduct.

Similiarly, in the Sixth Circuit, Ruzicka vs. General Motors Corp., 523 F. 2d 306 (6th Cir. 1975), the employer fired the plaintiff for being intoxicated on the job and for verbally abusing his supervisor. The employee then filed a grievance claiming that the penalty was unduly harsh. The union then filed the notice required for arbitration. However, it was necessary for the union to file a detailed statement of the grievance by the terms of the collective bargaining agreement. The union had failed to file such a statement

and the grievance expired. The employee sued the union for violation of the duty of fair representation. The District Court dismissed the suit, holding that mere neglect, rather than intentional hostile inaction was insufficient to establish a duty of fair representation claim. The Court of Appeals for the Sixth Circuit reversed holding that the unions "negligent and perfunctory handling" of the employees grievance constituted unfair representation.

In following the dictates of the U.S. SUpreme Court, other circuits have followed the tripartite standard as set forth in Vaca, supra, and concluded that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. (See DeArroyo v. Sindicato de Trabajadores Packing House, 425 F.2d 281-284 (1st Cir. 1970); C.F. Medlin v. Boeing Vertal Co., 620 F.2d 957-962 (3rd

Cir. 1980); Griffin v. U.A.W., 469 F.2d 181-183 (4th Cir. 1972); Farmer v. ARA Services, Inc., 660 F.2d 1096-1103 (6th Cir. 1981); Ethier v. U.S. Postal Services, 590 F.2d 733-736 (8th Cir. 1979).

The Seventh Circuit in this case also indicated that while Plaintiffs are correct in noting that perfunctory handling of agreements may be sufficient to establish liability in other circuits . . . this circuit has determined that until the Supreme Court resolves these recurring differences. . . Hoffman, stanos. Because of the Seventh Circuit's incorrect application of the precedent in Vaca, supra, and the conflict among the circuits, the Plaintiffs herein invite this court to clarify the issue of what standard is required to show that the union breached its duty to fairly represent its members.

B. PLAINTIFFS' JUNE 1985 COMPLAINT WAS TIMELY AS TO THE UNION'S REFUSAL TO GRIEVE BUDD'S DENIALS OF EMPLOYMENT THROUGH 1984 UNDER THE CONTINUING VIOLATION THEORY

In its opinion dated May 5, 1988, Circuit Court relied on its earlier ruling in Metz v. Tootsie Roll Industries, Inc., 715 F. 2d 299, 305-306 (7th Cir. 1983), for its determination that Plaintiffs' pre-1985 claims were time-barred. (See, Budd, Slip Op., Petitioners' Appx. B. pgs 6,7).

We do not take issue with the holding in Metz, supra. However, we believe that Metz is not applicable to the case at bar. In Metz, the Plaintiff filed one (1) grievance regarding his one (1) discharge. By its nature a discharge, unless the Plaintiff is rehired, is not capable of repetition. Here, Budd's violation was capable of repetition, and indeed was repeated. In other words, the Plaintiffs applied for preferential hiring not once,

but hundreds of times, including 186 times in 1985. (See, Petitioners' Appx., pp. 1-5, which is reproduced from Appellants' Brief Exh. 4, pp. 21-23). The Budd Co., rejected, by inaction Plaintiffs' applications, not once, but hundreds of times. The Plaintiffs made requests to the UAW for grievances regarding hundreds of these separate rejections (See, Petnr.'s Appx. E, pp. 1-5) The UAW, by its inaction, failed to pursue any of these requested grievances, except in one (1) instance for one (1) of the Plaintiffs, L.M. Jackson's application to 1 of 6 surviving Budd Co. plants.

This is not a case in which ". . . no other events are alleged to have occurred within the six-months prior to this action . . ." Metz, supra, at 306. Indeed, Plaintiffs' 1985 grievances attempts, and UAW inaction on them, were fresh violations

separate and distinct from the pre-1985 violations - occurring within six months of the filing of this action. (See, Budd, Slip Op. Petitioners' Appx. B at p. 4).

The only relevant question in the continuing violation context is whether the timely 1985 violations were part of a continuing chain of violations, same of which having occurred more than six (6) months prior to the filing of the action.

If the timely violations were part of the continuing chain of previous violations, then the previous violations are also actionable under the continuing violation theory. (See, Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976); Lewis v. Local Union 100, 750 F. 2d 1368, (7th Cir. 1984); Berry v. E.I. Du Pont de Nemours, 625 F. Supp. 1364, (D. Del. 1985).

In page 7 of its slip opinion, this Court indicates:

> Moreover, even assuming that the union's refusal to process plaintiffs' grievances amounted to a continuing violation of its duty to represent the plaintiffs, only complaints based upon conduct occurring within the six-month period preceding the filing of this complaint are timely. See Ray Lewis v. Local Union 100, 750 F. 2d 1368, (7th cir. 1984).

However, we believe that this proposition is at odds with the opinion in Lewis, supra.

In Lewis, the plaintiff filed his Section 301 Complaint on March 23, 1982, alleging repeated violations. Although occurring more than six months prior to the filing of the action, some violations would be considered the earlier violations timely because they were part of ". . . an ongoing course of conduct by the Union "since February, 1980" of repeatedly

refusing to refer Lewis out for employment".

Lewis, supra, at p. 1378.

Additionally, the Lewis Court stated:

> We are aware that the conclusion we reach may seem at odds with the policies of the six-month limitation period. In Del-Costello, the Court stated that the six-month period was appropriate because it provided for the rapid resolution of labor disputes and at the same time, afforded plaintiffs ample time in which to vindicate their rights. 462 U.S. at 169-70, 103 S. Ct. at 2293. Here, Lewis waited almost two years after he was aware that the Union was allegedly discriminating against him to file a lawsuit. Nonetheless, we have decided that Lewis' failure to bring suit against the Union for discriminatory acts in 1980 would not bar him from bringing suit for identical discriminatory acts occurring within the six months prior to March, 1982."

Id. at p. 1379. This explanation of variance from the policies of the six-month limitation period would not have been

necessary if Lewis had held, as this Panel's Slip Opinion indicates.

Further, it should be noted that the continuing violation theory tolls the six-month limitations period, even where the plaintiff knew or should have known, more than six-months prior to the filing of the Complaint, ". . . that the Union intended to take no further action with their grievance request." (See, Budd, Slip Op., Petitioners' Appx B. p. 6). In the Lewis case, the plaintiff filed an unfair labor practice charge with the NLRB in August, 1980, for more than six-months prior to his March 1982 Complaint, and the Lewis Court determined:

> "Thus, Lewis was aware at least by August 26, 1980, that the Union was discriminating against him in job referrals."

Lewis, supra, at p. 1379, F.N. 16.

Nonetheless, because the alleged February 1980 violation was part of the continuing chain of alleged violations, the Lewis Court held the February 1980 violation timely on the basis of a March 1982 Complaint.

Thus, it is Lewis, supra, and not Metz, supra, that is the controlling decision as applied to the instant case. The doctrine of stare decisis requires that like facts receive like treatment in a court of law. Flowers vs. U.S., 764 F. 2d 759 (11th Cir. 1985).

With regard to the importance of stare decisis, the Supreme Court has stated:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and

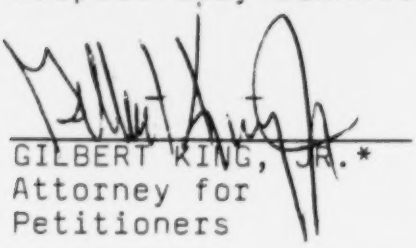
> expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."
> Moragne v. States Marine Lines, 398 U.S. 375, 403, 90 S. Ct. 1772, 1789, 26 L.Ed. 2d 339, 358 (1970).

Thus, this Court should hold that the pre-1985 violations are not timed-barred if they are, although separate incidents, part of a continuing chain of violation by UAW and Budd, the last of which occurred within six-months of the filing of this action.

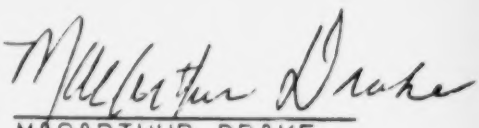
CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be granted and Judgment and Order of the Court of Appeals should be reversed.

Respectfully submitted,



GILBERT KING, JR.*
Attorney for
Petitioners



MACARTHUR DRAKE
Attorney for
Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 6, 1988.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. HUBERT L. WILL, Senior District Judge*

HENRY C. ADAMS, Jr., et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern
NO. 87-1771 vs.	)	District of Indiana,
THE BUDD COMPANY, et al., Defendants-Appellees.	)	Hammond Division
	)	No. 185-556 James T. Moody, Judge

A M E N D E D O R D E R

On consideration of the petition for rehearing filed by counsel for Plaintiffs-Appellants Henry C. Adams, Jr.,

et al., in the above-entitled cause, all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

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* The Honorable Hubert L. Will, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 5, 1988.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. HUBERT L. WILL, Senior District Judge

HENRY C. ADAMS, Jr., et al., Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 85 C 556 Judge James T. Moody
NO. 87-1771 vs.	
THE BUDD COMPANY, (H.Q.) Ticular Head of all Nationwide Budd Company Facilities and THE INTERNATIONAL UNION, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Defendants-Appellees.	

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1771

HENRY C. ADAMS, JR., et al.,

Plaintiffs-Appellants,

v.

THE BUDD COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. H85-556—**James T. Moody**, *Judge.*

ARGUED DECEMBER 3, 1987—DECIDED MAY 5, 1988

Before BAUER, *Chief Judge*, RIPPLE, *Circuit Judge*, and WILL, *Senior District Judge.**

WILL, *Senior District Judge.* Plaintiffs, 31 former employees of the Budd Company's Indiana plant ("Budd"), filed this action alleging that Budd violated their preferential hiring rights under a collective bargaining agreement by refusing to hire them at other Budd facilities after they were laid off. Plaintiffs also sued their collective bargaining agent, Local 1122 of the United Automobile, Aerospace & Agricultural Implement Workers of America ("the

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, sitting by designation.

union"), alleging that the union breached its duty of fair representation by refusing to arbitrate their charge that Budd violated the collective bargaining agreement. The district court granted summary judgment in favor of both defendants. We affirm.

I.

The undisputed facts on appeal reveal the following. The Budd Company is a manufacturer of automobile and truck body parts. It has two plants in Philadelphia and other plants in Tennessee, Michigan, and Ohio. Until November 1982, Budd also operated a plant in Gary, Indiana, which closed due to business conditions. The plaintiffs in this action were all employed by Budd's Gary facility. All were laid off between 1979 and 1980; they had not been recalled when Budd shut the Gary plant down. The following agreements set the terms and conditions of future employment for laid off workers in the Gary plant: a National Production and Maintenance Agreement; a local supplemental agreement; a letter agreement on preferential hiring; and a plant closedown agreement negotiated in October 1982.

These four agreements did not provide the laid-off workers much security. For example, the preferential hiring agreement required only that Budd (1) post job openings for plants covered by the National Agreement, (2) make available applications to seniority employees of the Gary plant on indefinite layoff at its Indiana personnel office, and (3) allow seniority employees to apply through the mail rather than having to apply in person at each Budd facility.

Each application by a laid-off worker under the provisions of the preferential hiring agreement was valid for only six months. After six months, the employee was required to send in a new application if he wished to be considered for employment at other Budd plants. Moreover, under the national and local agreements, preferential hire rights were limited to "seniority employees." Employees could retain seniority status for a maximum of five years after the date of layoff, or for a period equal

to total seniority, whichever was less. Finally, laid-off senior Gary employees were not given absolute preferential hiring rights; the July 27, 1982 letter agreement provided instead that laid-off employees were entitled to consideration for employment at other plants but that Budd reserved sole discretion to establish "local plant hiring eligibility requirements" and to reject employees on the basis of these local standards.

Budd closed its Gary plant in November 1982. Between 1982 and 1984, laid-off Gary employees submitted approximately 550 applications for openings at surviving Budd plants. One hundred and sixty of these employees eventually got jobs at other Budd plants; none of the plaintiffs ever received offers of employment.

In February 1984, a group of laid-off employees formed "The Committee of Former Budd Employees" ("the Committee"). All of the plaintiffs were members. The Committee sent a letter on March 7, 1984 to Dallas Sell, a director of the union, asking for assistance with their problems involving the recall and relocation practices of Budd's Philadelphia plant. On March 9, 1984, Owen Beiber, the President of the union, wrote back stating that he was referring the Committee's correspondence to the union's "Budd Company Department" for "investigation and follow-through."

Thomas Rodgers, the International Representative of the union's Budd Company Department, investigated the Committee's complaints. Rodgers obtained from Budd the personnel records of 24 Committee members denied employment. On April 10, 1984, Rodgers wrote the Committee that he had investigated Budd's refusal to hire them and that he was enclosing employment records which contained information on why Budd had denied them jobs at other plants. Rodgers stated: "It is for the reason shown that the Company refuses to hire you at the Philadelphia plant. If you have any further questions, do not hesitate to write to me."

Approximately one year later (and following two successive National Labor Relations Board dismissals of unfair labor practice charges filed by the Committee against the union), plaintiffs again submitted applications to Budd for jobs at other plants. By this time, however, fifteen of the former employees had lost their seniority rights (including the right to assert breach of the collective bargaining agreement) because five years had passed since Budd had laid them off. Moreover, because Budd had closed the Gary area personnel office the previous summer, Budd was no longer accepting mailed applications for preferential hire. When Budd denied the plaintiffs' February 1985 applications, the plaintiffs again asked the union to file grievances. Rodgers, however, refused this request because, he alleged, plaintiffs' applications were both untimely and without support in the contract.

Plaintiffs subsequently filed this action against Budd and the union alleging that the union breached its duty of fair representation, and that Budd's failure to rehire them at other plants constituted a breach of the collective bargaining agreement. At the close of discovery, both the union and Budd successfully moved for summary judgment. In granting the defendants' motions for summary judgment, the district court first found that the statute of limitations had run on plaintiffs' claims involving the union's failure to grieve or arbitrate Budd's refusals to hire them at other plants from 1979 through 1984. Second, the court found that although plaintiffs' June 1985 complaint was timely with regard to the union's failure to grieve Budd's February 1985 denials of preferential hire, defendants were entitled to summary judgment as to fifteen of the plaintiffs because they had lost seniority status prior to the filing of the 1985 applications. Finally, the court concluded that the remaining plaintiffs could not pursue their breach of contract claim against Budd because they were unable to establish a necessary element of that cause of action: that is, breach of the union's duty of fair representation.

II.

At issue is whether the court correctly granted defendants' motions for summary judgment. In a somewhat rambling fashion, plaintiffs raise various arguments on appeal. Many of the specific contentions advanced by the plaintiffs were not raised before the district court and hence were waived. *Hunter v. Allis-Chalmers Corporation*, 797 F.2d 1417, 1430 (7th Cir. 1986); *Evans v. Fluor Distributor Cos.*, 799 F.2d 364, 366 (7th Cir. 1986). Here, we need only review two issues: (1) whether there are material facts in dispute which could establish a breach of the union's duty of fair representation, which breach is a condition precedent to the plaintiffs' suit against Budd for violation of the collective bargaining agreement, and (2) whether plaintiffs' June 1985 complaint was timely as to the union's refusal to grieve Budd's denials of employment through 1984.

We first examine whether plaintiffs' claims surrounding the union's failure to grieve Budd's alleged violations of the collective bargaining agreement from 1979 through 1984 are time barred.

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), establishes a federal forum to resolve suits for violation of contracts between an employer and a labor organization. The LMRA contains no statute of limitations for § 301 actions. Yet the Supreme Court has held that the six-month statute of limitations set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to "hybrid § 301/duty of fair representation" claims like the present case. *DelCostello v. Teamsters*, 462 U.S. 151, 154 (1983). The six-month limitations period begins to run "from the time a final decision on the employee's grievance has been made or from the time the employee discovers, or in the exercise of reasonable diligence should have discovered, that no further action would be taken on his grievance." *Richards v. Local 134*, 790 F.2d 633, 636-37 (7th Cir. 1986); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir.

1983) (union's refusal to file grievance constitutes a final decision that triggers the running of the statute of limitations).

Here, though plaintiffs continually applied and were continually refused employment by Budd from 1979 through 1984, plaintiffs did not file their complaint in the district court until June 17, 1985. Plaintiffs contend that this filing was timely because the union never told them that it had completed its inquiry into plaintiffs' claims that Budd had violated the preferential hiring agreement. Yet, it is clear that plaintiffs knew or should have known as early as April 10, 1984—the date of Thomas Rodgers' letter stating that he had investigated plaintiffs' complaints—that the union intended to take no further action on their grievance request. Following receipt of this letter, plaintiffs were required to file their complaint regarding Budd's denial of their 1979-1984 applications no later than October 10, 1984.

Any remaining question concerning the plaintiffs' knowledge of the union's intention is dispelled by the fact that the Committee filed an unfair labor practice charge with the NLRB against the union on May 3, 1984, alleging a breach of the duty of fair representation. Plaintiffs' own actions thus establish that they, too, interpreted Rodgers' letter as a final decision by the union not to pursue their claims. *See Gustafson v. Cornelius Co.*, 724 F.2d 75, 77 (8th Cir. 1983) (court may rely on an unfair labor practice charge filed over the same conduct that later gives rise to a § 301 complaint as evidence that the plaintiff knew the union would pursue his grievance no further).

Alternatively, plaintiffs argue that even if they had known as of April 10, 1984, that the union would be taking no further action, the six-month statute of limitations should be "tolled" because the union's repeated refusal to process their grievances amounted to a "continuing violation" of its duty of fair representation.

Plaintiffs reliance on a continuing violation theory to revive their time-barred claims is misplaced. As the cases

in this circuit make clear, continued union inactivity after an initial failure to respond to a grievance request does not constitute a continuing violation of the duty of fair representation. *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 305-306 (7th Cir. 1983). For example, in *Metz*, the union notified plaintiff on May 5, 1981, that her discharge was in violation of the collective bargaining agreement. In the months that followed, plaintiff repeatedly requested the union to act on her grievance, yet the union failed to respond. Subsequently, the plaintiff filed a hybrid § 301/breach of duty of fair representation in the district court. The district court dismissed the action as untimely and we affirmed. Specfically, we stated that

> if this court were to permit the cloaking of [the union's] inactivity with illegality by invoking events which occurred more than six months prior to the bringing of this action, it would be in effect reviving a legal non-cognizable unfair labor practice.

Id. at 306.

Moreover, even assuming that the union's refusal to process plaintiffs' grievances amounted to a continuing violation of its duty to represent the plaintiffs, only complaints based upon conduct occurring within the six-month period preceding the filing of this complaint are timely. *See Ray Lewis v. Local Union 100*, 750 F.2d 1368, 1369 (7th Cir. 1984). Thus, the continuing violation theory could not support plaintiffs' assertion that the June 1985 complaint is timely as to any claims arising from Budd's refusal to hire them from 1979-1984 and the union's subsequent refusal to grieve these rejections. For this reason, the district court correctly dismissed as untimely, all claims except those based upon Budd's refusal to hire plaintiffs following receipt of their February 1985 employment applications.

We next address whether the union breached its duty by failing to grieve plaintiffs' claims involving Budd's alleged 1985 violations of the collective bargaining agreement. Generally, employees must attempt to exhaust any

intra-union appeals before they can maintain a suit against their employer under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *Clayton v. International Union, UAW*, 451 U.S. 679, 689 (1981).[1] Once the union makes a final decision on the employee's claim that the employer breached the collective bargaining agreement, the employee may not relitigate the merits of his grievance in a § 301 action against his employer unless he can show that the grievance process was somehow subverted. *Vaca v. Sipes*, 386 U.S. 171 (1967). This usually involves showing that the union breached its duty of fair representation. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976) ("To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must

[1] In addition to defending the grant of summary judgment on the ground that there are no facts in dispute that could establish a breach of the union's duty of fair representation, Budd also argues that summary judgment was appropriate because the plaintiffs failed to exhaust internal union appeal procedures and that exhaustion is a precondition to bringing a § 301/fair representation suit. Although plaintiffs represented at oral argument that they had in fact exhausted intra-union remedies, we have found nothing in the record to support this representation. Nevertheless, we decline Budd's invitation to affirm on this ground; for even if plaintiffs failed to exhaust the union's appeals procedure before bringing this suit, this would not necessarily bar plaintiffs' § 301 action as a matter of law.

Where a plaintiff can show one of the following situations, exhaustion of intra-union appeals is not required: (1) that union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; (2) that the internal union procedures are inadequate to either reactivate the grievance or to award him the full relief he seeks under § 301; and (3) that exhaustion of internal appeals would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits. *Clayton v. International Union, UAW*, 451 U.S. 679, 689 (1981); *see also Bassett v. Local Union No. 705*, 773 F.2d 932, 935 (7th Cir. 1985). Here, in granting summary judgment, the district court did not address the exhaustion requirement and therefore made no findings whether any of these conditions were present in this case.

also carry the burden of demonstrating breach of duty by the Union."). Thus, before plaintiffs can pursue their § 301 claim against Budd, they must meet the burden of showing that the union breached its duty fairly to represent laid-off employees. If plaintiffs are unable to prove such a breach, their § 301 claim is barred. *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221, 1223 (7th Cir. 1985).

In this circuit "mere negligence" or even "gross negligence" on the part of a union is insufficient to support an action for breach of the duty of fair representation; plaintiffs must show instead that a union engaged in "intentional misconduct." *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 243 (7th Cir. 1986). Thus, a "union may be liable if it discriminates against the employees for forbidden reasons (such as race or politics, including the employee's position on the union and its leaders). It is not liable, however, for careless or boneheaded conduct." *Id.* at 244.

Notwithstanding that this circuit has repeatedly "declined all invitations" to overrule the intentional misconduct standard of *Hoffman*, (*see e.g.*, *Camacho*, 786 F.2d at 244; *Grant v. Burlington Industries*, 832 F.2d 76, 79-80 (7th Cir. 1987); *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983); *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200 (7th Cir. 1983)), plaintiffs renew the invitation. They argue: (1) that the district court erred in not applying the less stringent standard governing breach of fair representation cases contained in *Baldini v. Local Union No. 1095, UAW*, 581 F.2d 145 (7th Cir. 1978); and (2) that the district court erred when it declined to infer intentional misconduct from evidence that the union repeatedly showed a lack of vigor in investigating plaintiffs' complaints.

The district court rejected both these arguments, and we reject them here. To begin with, plaintiffs' reliance on *Baldini* is misplaced. The *Baldini* test (i.e., that a union subjects itself to liability for unfair representation

when it arbitrarily or perfunctorily handles a grievance) has been superceded by the *Hoffman* intentional misconduct rule. Although plaintiffs are correct in noting that perfunctory handling of a grievance may be sufficient to establish liability in other circuits (*see e.g., Robesky v. Qantas Empire Airways*, 573 F.2d 1082, 1091 (9th Cir. 1978); *Wyatt v. Interstate & Ocean Transportation*, 623 F.2d 888, 891 (4th Cir. 1980); *Curtis v. United Transportation Union*, 700 F.2d 457 (8th Cir. 1983)), this circuit has determined that until the Supreme Court "resolve[s] these recurring differences . . . *Hoffman* stands." *Camacho*, 786 F.2d at 246.

To support their claim that summary judgment was improper even under the more stringent *Hoffman* standard, plaintiffs contend that there is "ample evidence . . . in the record as a whole from which the fact-finder or jury could determine that [the union] deliberately and unjustifiably failed to represent plaintiffs." Plaintiffs then assert that intentional misconduct should be inferred from evidence of the union's "repeated and deliberate" refusal to file a grievance.

Taken in its best light, however, the evidence here can only support a claim of inferior representation, and as we have noted, *Hoffman* precludes our reviewing the quality or adequacy of representation. The record shows: (1) that Rodgers relied on Budd's representation that plaintiffs were unemployable because they had allegedly not met "local" hiring standards without any independent investigation; (2) that Rodgers refused to pursue plaintiffs' 1984 grievance request because he believed the union had no sound basis for submitting grievances in view of the restrictive language in the preferential hire agreement that gave Budd sole discretion to establish "local plant hiring eligibility requirements" and to reject employees on the basis of these local standards; and (3) that Rodgers sat on plaintiffs' 1985 grievance request because he had investigated plaintiffs' identical claims of contractual violations a year earlier and found that, given the language of the preferential hire agreement, they were without support.

Thus, Rodgers' actions, perfunctory though they may have been, do not come close to the level of intentional misconduct envisioned by the *Hoffman* decision. Indeed, nothing in the record can support the conclusion that the union acted in a "deliberate and severely hostile irrational manner, or that it engaged in "fraud, deceitful action or dishonest conduct." *Hoffman*, 658 F.2d at 522. In fact, plaintiffs uniformly admitted at their depositions that they possessed no evidence of any hostility by the union toward any plaintiff.[2]

To sum up, plaintiffs failed to present any evidence of intentional misconduct by the union. Because the showing of a breach of the union's duty of fair representation is a necessary condition to establishing plaintiffs' case against Budd, plaintiffs' claims against both defendants must fail. Accordingly, the decision of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] Nor do the plaintiffs claim that Rodgers failed altogether to represent their claims. This would be a different case in the event of such a claim because this circuit has stated that it will review an arbitral action that instead of interpreting a contract, is tantamount to revising it. *See Camacho, supra*, 786 F.2d at 244 ("The grievance and arbitration machinery is designed to place review . . . in specialized tribunals. Review of arbitral awards is close to nonexistent so long as the arbitrator interprets (as opposed to revises the contract)."). Where a contract guarantees representation, an egregious and flat out refusal to represent has the effect of cancelling the contractual guarantee. *Hoffman* does not (and could not consistent with congressional policy) bar review of an egregious failure to represent contractual rights. Such a failure is neither alleged here nor disclosed by the record.

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APPENDIX C

UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY ADAMS, et al., Plaintiffs,	)	
v.	)	Civil No. H85-556
THE BUDD COMPANY, et al. Defendants.	)	

O R D E R

This matter comes before the court on a Motion to Amend and or Alter Judgment of February 11, 1987 which the plaintiffs filed on February 24, 1987. The Budd Company and the Union defendants filed responses in opposition on March 17, 1987 and April 3, 1987, respectively, to which the plaintiffs have not replied. For reasons discussed below, the Motion to Amend and or Alter Judgment is DENIED.

The plaintiffs filed this action on June 17, 1985 alleging that their former employer, The Budd Company, terminated their employment and refused to rehire them and thus breached the collective bargaining agreement between The Budd Company and the Union. The complaint also alleges that the Union breached its duty of fair representation by failing to grieve or arbitrate their charge that The Budd Company had violated the collective bargaining agreement. The Court granted the defendants' Motion for Summary Judgment on February 9, 1987. The court will consider the plaintiffs' claims of error in seriatim.

II.

The plaintiffs first contend that the court erred in concluding that the collective bargaining agreement provides that an employee loses his preferential hiring rights after five years of continuous lay-off or after a period equal to his total seniority whichever is lesser. As the court explained in its order granting summary judgment, the preferential hiring provisions of the collective bargaining agreement were expressly limited to "seniority employees" and the collective bargaining agreement provided that employees' seniority rights expire after five years of continuous lay-off or after a period equal to his total seniority, whichever is lesser.

In opposing summary judgment, the plaintiffs filed no evidentiary materials to show the existence of a genuine issue on the question of whether particular plaintiffs' seniority rights and, consequently, hiring rights had expired. When a summary juogment motion is made and supported as provided in Fed.R.Civ.P. Rule 56(c), Rule 56(c) requires "the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, ___U.S. ___, 106 S.Ct. 2505, 91 L.Ed.2d 265, 274 (1986). Factual assertions included only in the plaintiffs' brief are insufficient to dispute a fact proven by affidavit or by authenticated copies of the preferential hiring agreement and collective bargaining

agreement. Because the collective bargaining agreement's preferential hiring provisions presented no ambiguity as to the duration of preferential hiring rights and the plaintiffs presented no Rule 56 materials to demonstrate such an ambiguity, the court properly decided that issue as a matter of law.

III.

The plaintiffs next contend that the court erred in resolving an ambiguity in the preferential hiring agreement as to the conditions the preferential hirin agreement imposed for the exercise of preferential hiring rights. Although the language is somewhat befuddled, the plaintiffs seem to be asserting that the preferential hiring agreement was ambiguous as to whether persons who were seniority employees at the

time of their lay-off could exercise preferential hiring rights after they had subsequently lost their status as seniority employees. The court found the language of the preferential hiring agreement to be unambiguous and that neither the Rule 56 submissions nor the the plaintiff's present motion demonstrates otherwise.

IV.

The plaintiffs next raise, for the first time, the argument that the court's construction of the collective bargaining agreement renders the agreement violative of the Labor Management Relations Act. As a consequence, the argument continues, the court ignored the rule of statutory construction which imposes a duty to give

contractual provisions a lawful construction, if possible without violence to the plain language. Without deciding whether the court's construction of the collective bargaining agreement would render the agreement unlawful, the court finds that any other construction would be contrary to the clear meaning of the agreement. Thus, the court contravened no rule of statutory construction in interpreting the collective bargaining agreement.

V.

The plaintiffs' contentions that the court erred, on various grounds, in determining as a matter of law that the complaint was untimely filed as to numerous plaintiffs are facially without merit. The issues raised in this regard were

adequately and thoroughly addressed in the court's order granting summary judgment.

VI.

The plaintiffs also contend that the court erred in finding that the plaintiffs whose claims are not time-barred had failed to present any evidence of intentional misconduct by the union. The plaintiffs assert that the record as a whole includes evidence from which one could infer that the union deliberately refused to file their grievances. As the court stated in its previous order, an employee bears the substantial burden of pleading and proving that the union deliberately and unjustifiably refused to represent him. In the face of documentary evidence showing an absence of any deliberate misconduct of the union, the plaintiffs presented no

evidence to suggest the contrary. Thus, the plaintiffs failed to make a showing sufficient to establish the existence of intentional misconduct, an element essential to the plaintiffs' case and on which the plaintiffs would bear the burden of proof at trial. Consequently, summary judgment was appropriate on that issue. Celotex, 106 S.Ct. 2548 (1986).

VII.

The plaintiffs also assert that the court erred in striking their cross-motion for summary judgment which was filed 48 days after the date the court had set as the deadline for the filing of pre-trial motions. The plaintiffs cite Fed.R.Civ.P. 56(a) for the porposition that a party may move for summary judgment "at any time. . . after service of a motion for summary

judgment by the adverse party." The time for filing summary judgment motions is subject to the further rule that "the judge. . .shall. . .enter a scheduling order that limits the time. . .to file and hear motions." Fed.R.Civ.P 16(b). On October 29, 1985, the court entered such an order specifying that the final day for the filing of pre-trial motions was October 31, 1986. The plaintiffs' failure to heed this deadline is grounds for the court to disregard their untimely motion.

VIII.

Finally, the plaintiffs assert that the court erred in dismissing the claims of ten plaintiffs on August 15, 1986, for failure to espond to interrogatories and that the court erred in granting the defendants' Motion for Protective Order against the

taking of Owen Beiber's deposition. Because these contentions were duly addressed in previous orders, the court declines to retrace those discussions in the present order.

CONCLUSION

For the reasons discussed above, the plaintiffs' Motion to Amend and or Alter Judgment of February 11, 1987 is hereby DENIED.

ENTER: April 14, 1987

/s/
JAMES T. MOODY, JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D

UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY ADAMS, et al.,	)	
	)	JUDGMENT IN A
	)	CIVIL CASE
v.	)	
	)	
THE BUDD COMPANY, et al.	)	CASE NO. H85-556

Jury Verdict: This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that because The Budd Company and the Union defendants have shown that there exists no genuine issue as to any material fact and that they are

entitled to judgment as a matter of law, the defendants' Motions for Summary Judgment are hereby GRANTED. The Clerk of the Court is DIRECTED to enter judgment accordingly. The plaintiffs' Cross-Motion for Summary Judgment is ORDERED STRICKEN from the record.

DATED: February 11, 1987
Clerk: RICHARD E. TIMMONS

/s/_____
SUZANNE D. ALCOLA
Deputy Clerk

UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY ADAMS, et al., Plaintiffs,	)	
v.	)	Civil No. H85-556
THE BUDD COMPANY, et al. Defendants.	)	

ORDER

This matter comes before the court on Motion for Summary Judgment filed by defendant The Budd Company and defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 1122 (the Union) on October 31, 1986. The plaintiffs filed a motion and memorandum in opposition and a Cross-Motion for Summary Judgment on December 19, 1986 to which The Budd Company replied on January 15, 1987 and the Union defendants replied on January 16, 1987. For reasons discussed below, the defendants' Motions for Summary Judgment

are GRANTED and the plaintiffs' Cross-Motion for Summary Judgment is STRICKEN inasmuch as it fails to meet the time requirements for filing such motions as set forth in this court's scheduling order dated October 29, 1985.

I.

The plaintiffs filed this action on June 17, 1985 alleging that their former employer, The Budd Company, terminated their employment and refused to rehire them and thus breached the collective bargaining agreement between The Budd Company and the Union. The complaint also alleges that the Union breached its duty of fair representation by failing to grieve or arbitrate their charge that The Budd Company had violated the collective bargaining agreement.

The defendants request summary judgment on the grounds that the plaintiffs' claims are untimely filed, the plaintiffs have failed toexhaust available internal union remedies, the plaintiffs have presented no evidence of intentional union misconduct, and many of the plaintiffs are unable to show a breach of the collective bargaining agreement.

The plaintiffs are former employees of The Budd Company who were laid off between 1979 and 1980 and were never recalled by The Budd Company. They claim that The Budd Company violated the preferential hiring provisions of the collective bargaining agreement by refusing to hire them at other Budd Company facilities after they were laid off from the Gary facility. They claim the Union breached its duty of fair representation by refusing to pursue grievances to protest The Budd Company's

refusal to heed the preferential hiring provisions.

II.

Timeliness of Complaint

Section 301 of the Labor Management Relations Act (LMRA) establishes a federal forum to resolve suits for violation of contracts between an employer and a labor organization. 29 U.S.C. Sec. 185(a). The LMRA containes no statute of limitatins for Sec. 301 actions. The Supreme Court has decided, however, that the six-month statute of limitations contained in Sec. 10(b) of the National Labor Relations Act applies to hybrid Sec. 301/duty of fair representation cases. Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 154 (1983). The cause of action

accrues and the statute of limitations begins to run when the "final decision on the plaintiff's grievance has been made or from the time the plaintiff discovers or in the exercise of reasonable diligence should have discovered, that no further action would be taken on his grievance." Richards v. Local 134, 790 F.2d 633, 636-37 (7th Cir. 1986); Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983).

In the case at bar, the plaintiffs filed their complaint on June 17, 1985. Thus, the statute of limitations question turns on whether the plaintiffs knew or should have known by December 17, 1984 that the Union would take no further action on their grievance. The most recent lay-off among the plaintiffs was on December 12, 1981. After their lay-offs the plaintiffs

filed, at various times, applications for employment at other Budd Company facilities and were rejected. In or before February of 1984, a group of laid-off Budd Company employees formed an organization called "The Committee of Former Budd Company Employees." By the summer of 1984, all of the plaintiffs in the present case were members of this Committee.[1] The Committee sent a letter on March 7, 1984 to Dallas Sell, Director of Region 3 of the UAW, asking Sell to assist them in solving their dilemma about the transfer and relocation practices of The Budd Company plant in Philadelphia, Pennsylvania. On March 9, 1984, Owen Beiber, the President of the UAW, sent the Committee a letter stating that he was referring the Committee's correspondence regarding The Budd Company's relocation practices to the UAW Budd Company Department "for

investigation and follow-through."

On April 10, 1984, Thomas Roogers, the International Representative of the UAW Budd Company Department sent a letter to the Committee informing them that he had investigateo the Buoo Company's refusal to hire them ano enclosing the employees' personnel recoros on which The Budd Company's hiring decisions were based. Rodgers wrote, "It is for the reason shown that the Company refuses to hire you at the Philadelphia plant. If you have any further questions, do not hesitate to write to me." When the Committee received this letter in April of 1984, its members knew or should have known that the Union deemed this the eno of its inquiry into The Budd Company's refusal to rehire them. By Rodgers' letter, it was clear that the Union intendeo to take no further action on their behalf with regard to the employment

applications they had previously made to The Budd Company.

Indeed, the Committee must have known that the Union intended to take no further action because the Committee filed an unfair labor practice charge on May 3, 1984, against the Union alleging that the Union breached its duty of fair representation by failing to pursue the displaced employees' preferential hiring rights at The Budd Company's Philadelphia plant. It was readily apparent that the Union had taken the position that the plaintiffs' applications had been justifiably refused and that the Union did not intend to submit grievances to charge violations of the preferential hiring provisions with regard to these former employees. If they were not actually aware that the Union would have alerted them that

the Union intended to take no further action.

The statute of limitations on the charges stemming from the plaintiffs' applications for employment between 1979 and spring of 1984 began to run or April 10, 1984 when Thomas Rodgers effectively notified them that he had completed his inquiry into their questions about preferential hiring rights. Thus, the plaintiffs were required to file suit on this grievance on or before October 10, 1984. Because they did not file this suit until June 17, 1985, their claims based on The Budd Compaby's refusal to hire them diring the perioo from 1979 through spring of 1984 are barreo by the six-month limitation period. Del Costello, 462 U.S. at 154. Contrary to the plaintiffs' assertion, the filing of an unfair labor practices charge with the NLRB does not

toll the running of the limitations period in hybrid claims against the employer and a union. Adkins v. International Union of Electrical,- Radio & Machine Workers, 769 F.2d 330, 335 (6thCir. 1985); Katsaros v. Transit-Mix Concrete Corp., 615 F.Supp 450 (S.D.N.Y. 1985).

The plaintiffs filed additional employment applications to six of the Budd Company plants on February 22, 1985, and then sent letters of grievances on April 6, 1985, when The Budd Company failed torespond to their applications. The grievance specified that the Union's failure to respond to the grievances in 10 days would be deemed a rejection of their grievances. The grievance letter dated April 6, 1985 complained only of The Budd Company's denial of the plaintiffs' February 22, 1985, applications. The court

must give the plaintiffs the benefit of the inference that they did not know until April 23, 1985 that the union would not pursue their grievances. Because the complaint in this case was filed within six months after the April 23, 1985 date, the claims based on these grievances are not time-barred.

Seniority Rights

The collective bargaining agreement provides that an employee loses is seniority rights after five years of continuous lay-off or after a period equal to his total seniority whichever is lesser. These seniority rights include a right to hiring perference to laid-off employees who apply for positions and meet local hiring requirements in other Budd Company plants. In addition, an employer

retains perferential rehire rights for a minimum period of 36 months, even if his seniority is less than 36 months.

When the 21 plaintiffs wrote to The Budd Compaby on February 22, 1985, to request employment, fifteen of them had already lost their seniority rights, including the right to assert a breach of the collective bargaining agreement. Moreover, the preferential hiring provisions applied only to "seniority employees." Plaintiff Willie Ballard lost his status as a seniority employee on October 23, 1984 after he had been on continuous lay-off for five years. Plaintiff Willie Bingham's seniority rights expired on October 29, 1984, two years after his lay-off. Because plaintiff Joyce Clark was laid off of December 5, 1979 after being employed for only two and a half years, she would have lost all

seniority on Junce 6, 1982 but her year minimum perioo for perferential hiring rights expireo on December 5, 1982. Joseph Cruz lost his seniority rights on May 28, 1984 after being on continuous lay-off for a five year perioo. Louis Cruz also lost his seniority on May 28, 1984 after being on five years of continuous lay-off. Michael Dawson lost his seniority in April of 1982 and his three-year preferential hiring rights perioc expired in October of 1982. Plaintiff Melvin R. Page lost seniority on or about September 11, 1983 and his three-year preferential hiring rights period expireo on or about June 6, 1983. John Perkins' seniority was lost on November 15, 1984 after he hao been on continuous lay-off for five years. Willie Smith lost seniority on September 30, 1984, five years after his lay-off. jerome Tyrone lost seniority rights on January 9,

1985, five years after his lay-off. Alfred Volk's seniority rights expired on November 2, 1984, five years after his lay-off. Robert Walker's seniority rights expired on November 16, 1984, five years after his lay-off. Robert Weems seniority rights expired on November 19, 1984, five years after his lay-off. Leroy Williams' seniority rights expired on November 5, 1984 five years after his lay-off. Milton Wilson's seniority rights expired on September 10, 1984, five years after his lay-off.

After their seniority status period and the three-year preferential hiring rights period had expired, these employees were no longer members of the bargaining unit and were no longer covered by the provisions of the collective bargaining agreement. Thus, when they requested re-employment on

February 22, 1985, The Budd Company was, by virtue of the collective bargaining agreement, under no special obligation to hire them. Of course, it owed these applicants the duty to refrain from such illegal practices as racial discrimination but only because this hiring restraint is imposed by law, indepent of any collective bargaining provision. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Company, 404 U.S. 157, 181 n.20 (1971). These employees have no standing to assert that a breach of the collective bargaining agreement occurred at a time when they were no longer seniority employees of The Budd Company and therefore, were not parties to the agreement. However, plaintiffs Henry C. Adams, Robert Bernal, Geroge Berry, Willie J. Cornelius, Malcolm Tucker, and Emanuel Williams were bargaining unit employees and had preferential hiring

rights when they applied for employment on February 22, 1985.

Duty of Fair Representation

Employees seeking a remedy for alleged breaches of the collective bargaining agreement between their union an their employer must attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before they may maintain a suit against their employers under Sec. 301. Clayton v. International Union, 451 U.S. 679, 682 (1981). Once a union makes a final decision on the employees charge that the employer breached the collective bargaining agreement, the employee may not litigate the merits of his grievance unless he can show that the grievance process was somehow subverted. Most often, this is done by

showing that the union breached its duty to fairly represent the employee in the grievance procedure. Vaca v. Sipes, 306 U.S. 171 (1967). If the employee cannot prove such a breach, his Sec. 301 claim is barred. Huffman v. Westinghose Electric Corp., 752 F.2d 1221, 1223, (7th Cir. 1985).

Thus, before the plaintiffs may pursue their breach of contract claim against The Budd Company in the present case, they must show that the Union breached its duty to fairly represent these employees when the Union failed to respond to the plaintiffs' letter of grievance dated April 6, 1985. To show a breach of the duty of fair representation, an employee "bears the substantial burden" of pleading and proving that the union deliberately and unjustifiably refused to represent him. Rupe v. Spector Freight Systems, Inc., 679

F.2d 685, 691 (7th Cir. 1982); Graf v. Elgin, Joliet and Eastern Railway Co., 697 F.2d 771, 778 (7th Cir. 1983). This requirement of showing "intentional misconduct" by the union applies to all duty of fair representation cases and requires the plaintiff to show "substantial evidence of fraud, deceitful action or dishonest conduct" by the union. Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (7th Cir. 1981).

In the present action, the plaintiffs assert that the union breached the duty of fair representation by failing to file a grievance in response to their letter of April 4, 1985. In cases arising out of a union's administration of the grievance system "courts may enforce the duty of a jnion to fairly represent an employee only when union conduct breaching that duty is intentional, invidious, and directed at the

employee." Swatts v. United Steelworkers of America, No. 85-2688, slip op. at 6 (7th Cir. Dec. 19, 1986) (quoting Hoffman, 658 F.2d at 520). See Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983); Superczynski v. P.T.O. Services, Inc., 706 F.2d 200, 202 (7th Cir. 1983); Canon v. Consolidated Freightways Corp., 524 F.2d 290, 293 (7th Cir. 1975).

In Hoffman, the court specifically held that a union's failure to pursue a grievance in a timely manner is insufficient to state a breach of the union's duty to the employee. 658 F.2d at 5222-23. Also, in Graf, the court upheld the district court's grant of summary judgment for the defendant union because the plaintiff "was not able to show any motive for [the union's representative's] trying to do him in -- personal animosity, union politics, or anthing else." 697 F.2d

at 777. Recently, the Seventh Circuit reviewed the standard of "intentional misconduct" in these cases and, after a thorough and detailed analysis of the relevant policy considerations, reaffirmed its commitment to it. Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (1986).

Applying this standard to the case before it, the court finds that plaintiffs have failed to demonstrate the requisite intentional misconduct on the part of the Union. When construing all facts in the light most favorable to plaintiff, the court finds that plaintiffs can demonstrate that the union's conduct, at worst, amounted to gross negligence; but, "gross negligence is not a basis for liability." Camacho, 786 F.2d at 244. Summary judgment is appropriate only where the court is satisfied that the moving party has met its

burden of establishing that there exists no genuine issue with respect to any material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; see Box v. A & P Tea Co., 772 F.2d 1372, 1375 (7th Cir. 1985); Thornton v. Evans, 692 F.2d 1064, 1074 (7th Cir. 1982). Additionally, the court must view the evidence submitted by the movant in the light most favorable to the non-moving party. P.H. Glatfelter C. v. Voith, Inc., 784 F.2d 770, 774 (7thCir. 1986); Egger v. Phillips, 710 F.2d 292, 296 (7th Cir.), cert. denied, 464 U.S. 918 (1983). However, the plan language of Fed.R.Civ.P. 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of

proof at trial. Celotex Corp. v. Catrett, 106 s.Ct. 2548 (1986).

Giving the plaintiffs the benefit of every reasonable inference, the facts reveal that the plaintiffs notified the Union on April 6, 1985 that their employment applications had been rejected. When the Union did not respond to their letter, the plaintiffs construed the failure to respond as a refusal to pursue their grievance and began preparing this lawsuit. The plaintiffs have failed to present any evidence whatsoever to suggest that the Union engaged in fraud, deceitful action or dishonest conduct." Hoffman, 658 F.2d at 522. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honesty of pupose in the exercise of its discretion." Ford Motor Co. v.

Ruffman, 345 U.S. 330, 338 (1953). However, "[m]ere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation." Swatts, slip op. at 6 (quoting NLRB v. American Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980). The actions of the union and its officials do not meet the level of deliberate and extremely reckless conduct envisioned by the Seventh Circuit in Camacho and Graf.

The plaintiffs have failed to establish any facts to show a breach of duty of fair representation. Because the showing of a breach of the Union's duty of fair representation is an element essential to the plaintiff's claims against both the Union and The Budd Company must fail.

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The defendants assert that the plaintiffs' membership in this Committee should be taken as established because the plaintiffs failed to respond or object to a request for admission asking all of the plaintiffs to admit that "Plaintiff was previously a member of an organization called The Committee of Former Budd Company Employees." However, this request for admission was made only three days before the close of discovery. Requests for discovery must be made in sufficient time to allow the opposing party to respond before the termination of discovery. Discovery requests not filed in sufficient time to allow the opponent to respond within the discovery period are untimely and the opponent is under no duty to comply with this untimely discovery request. Thus, the plaintiffs' failure to respond or object to the request for admission is not deemed an admission because the request for admission was untimely filed.

However, the plaintiffs' membership in this Committee of Former Budd Company Employees is a fact which must be taken as true because the plaintiffs have failed to file any submissible summary judgment materials to rebut the deposition testimony of Emmanuel Williams who stated that all of the plaintiffs belonged to the Committee. E. Williams Dep., p. 18-19.

CONCLUSION

Because The Budd Company and the Union defendants have shown that there exists no genuine issue as to any material fact and that they are entitled to judgment as a matter of law, the defendants' Motions for Summary Judgment are hereby GRANTED. The Clerk of the Court is DIRECTED to enter judgment accordingly. The plaintiffs' Cross-Motion for Summary Judgment is ORDERED STRICKEN from the record.

ENTER: February 9th, 1987

/s/ _____
JAMES T. MOODY, JUDGE, UNITED STATES DISTRICT COURT

APPENDIX E

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Weems, Robt.	2/22/85	4/6/85 7/10/84 3/7/84 3/26/84
Walker, Robt.	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84
Wms, Emanuel	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84
Wms., Leroy	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Wilson, Milton	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Volk, Alfred	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Humphrey, Curtis	2/22/85 9/83; 2/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Jackson, L.M.	2/22/85 9/83; 1980	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 10/9/83
Jenkins, Leon	7/10/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 3/29/84
Kennedy, Bennie	7/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Leggett, Ronald	2/23/85 9/3/83	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 3/29/84
Montgomery, M.	2/23/85 12/82	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Nedoff, Jerome	2/23/85	4/6/85
	12/27/84	2/23/85
	7/84	7/10/84
		3/7/84
		3/26/84
		2/29/84
Page, Melvin	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
Perkins, John	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
Smith, Willie	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
Tucker, Malcolm	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
		2/29/84
Tyron, Jerome	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Adams, Henry, Jr.	8/82 2/20/85 8/23/84 2/22/85	3/7/84 3/26/84 7/10/84 7/16/84 4/6/85
Ballard, Willie	10/25/84 10/26/84 1/1/84 6/18/84 2/84 before Oct. 1984; after Nov. 1, 1984	4/6/85
Bernal, Robert	10/1/81 10/25/84	6/6/85 2/23/85 3/7/84 3/26/84
Berry, George	2/22/85	4/6/85
Bingham, Willie	6/19/85?	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84
Cornelius, Willie	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Clark, Joyce	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Dawson, Michael	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Cruz, Joseph	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Cruz, Louis, Jr.	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Donald, Howard	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Donald, Lillie	7/10/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Gilbert, Carolyn	7/10/84 1982; 1983; 1984;	4/6/85 2/23/85 7/10/84 3/7/84 2/11/83 3/26/84

FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.

NO. 88-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY ADAMS, ET AL.,
Petitioners

v.

THE BUDD COMPANY, ET AL.,
Respondents

BRIEF OF RESPONDENT THE BUDD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THIS IS THE APPROPRIATE CASE TO RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT COURT OF APPEALS AND OTHER CIRCUIT COURTS OF APPEAL REGARDING WHETHER A UNION THAT ACTS PERFUNCTORILY IN THE HANDLING OF A GRIEVANCE BREACHES ITS DUTY OF FAIR REPRESENTATION UNDER SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT?

2. WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE PETITIONERS' COMPLAINT WAS NOT TIMELY CONCERNING CLAIMS THAT AROSE BETWEEN 1982 AND 1984?

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OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit denying petitioners' Petition for Rehearing is reported at 846 F.2d 428. The Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 846 F.2d 428, 128 LRRM (BNA) 2387, and 109 Lab.Cas.(CCH) ¶10488.

The Order of the District Court denying petitioners' Motion to Amend and/or Alter Judgment is not reported. The Judgment and Order of the United States District Court for the Northern District of Indiana is reported at 125 LRRM (BNA) 3208 and 109 Lab.Cas.(CCH) ¶10706.

The Order of the United States District Court for the Northern District of Indiana dismissing the Complaint as to ten petitioners against Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1122 (the "Union" or "UAW") dated August 21, 1986 is not reported. The Order of the District Court dated September 23, 1986 denying petitioners' Motion to Amend and/or Alter Judgment dismissing the Complaint against Respondent UAW as to ten petitioners is not reported.

COUNTERSTATEMENT OF THE CASE

The Budd Company[1] (hereinafter "Budd" or "the Company") is a manufacturer of automobile and truck body parts. At the time of the events at issue in this case, Budd operated two plants in Philadelphia, and other plants in Tennessee, Michigan and Ohio. Until November 1982, Budd also operated a plant in Gary, Indiana, which was closed due to business conditions. The 30 petitioners[2] in this action were permanently laid off from Budd's Gary plant between 1979 and 1980.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1122 (hereinafter collectively referred to as the "UAW" or "the Union") represented the employees at Budd's Gary plant. The following four agreements between Budd and the UAW set forth the rights of Gary employees to jobs at other Budd plants: a National Production and Maintenance Agreement; a local supplemental agreement; the July 27, 1982 letter agreement on preferential hiring; and a plant closing agreement negotiated in October 1982.

As the Seventh Circuit recognized, these agreements provided only limited rights to jobs at other Budd plants. The agreements provided "preferential hire rights" to jobs at the remaining Budd plants only to laid off Gary employees who were "seniority employees." A Gary employee was a "seniority employee" for only as long as he retained seniority rights, which was for a maximum of five years after date of layoff, or for a period equal to total seniority, whichever was less.

Furthermore, laid off Gary seniority employees did not have absolute preferential hiring rights. In order to be hired

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1. The list of corporate affiliations of The Budd Company is as follows: The Budd Company is a wholly owned subsidiary of Thyssen A.G. of Duisberg, West Germany.

2. Robert Walker, a plaintiff in the case below, is not a petitioner.

for open positions, seniority employees had to file a Budd application and meet the respective Budd plant's "local plant hiring eligibility requirements." By the terms of the July 27, 1982 letter agreement, Budd retained the absolute right to establish the local plant eligibility standards and to reject employees on the basis of those standards.

The agreements' terms also obligated Budd to: 1) maintain a personnel office in the Gary area for at least twelve months after the Gary plant's closing; 2) post job openings at that personnel office for other plants covered by the National Agreement; 3) make available Budd applications at the personnel office to employees who retain seniority rights under the agreement; and 4) allow seniority employees to apply for open jobs at other plants through the mail using those application forms, rather than having to apply in person. These special provisions, which facilitated the preferential hiring application process at the surviving Budd plants, expired when Budd closed its Gary area personnel office in July 1984 (having kept the office open seven months longer than required).

In November 1982, with the closing of the Gary plant imminent, the Union held an open meeting with its Gary plant membership. The Union publicized the meeting at the Gary plant, the local union hall, and in the local newspaper. Approximately 2,000 of the 3,000 Union members attended the meeting, at which Union officials discussed the employees' limited preferential hiring rights and distributed copies of the plant closing agreement.

Between 1982 and mid-1984, approximately 550 former Gary employees, including most of the petitioners, submitted applications for openings at the surviving Budd plants. Budd plants hired approximately 160 of those preferential hire applicants, but none of the petitioners.

In February 1984, a group of laid off employees formed "The Committee of Former Budd Employees" (hereinafter

"the Committee"). All 30 petitioners are members. At that time, the Committee members wrote UAW President Owen Bieber to express their dissatisfaction concerning the Union's efforts regarding the failure of its members to obtain employment with Budd. On March 9, 1984, Bieber advised the Committee by letter that he referred the Committee's charges to the UAW-Budd department for investigation. That letter crossed in the mail with the Committee's March 7, 1984 letter to UAW Regional Director Dallas Sell, which sought assistance concerning the recall and relocation practices at Budd's Philadelphia plant.

Thomas Rodgers, the International Representative assigned to the Union's Budd department, investigated the Committee's complaints in March and April of 1984. Rodgers contacted the Company and sought the reasons and records concerning its plants' rejection of employment of the 24 then known Committee members. Budd forwarded to Rodgers the Gary plant disciplinary and attendance records of these Committee members. Budd advised Rodgers that it rejected the Committee members for preferential hire because their Gary plant disciplinary and/or attendance records did not meet the local hiring standards of the Budd plants to which they applied. On April 10, 1984, Rodgers wrote the Committee that he investigated Budd's refusal to hire them and that he was enclosing their Budd personnel records which contained information on why it denied them jobs. Rodgers requested that the Committee contact him if it had "any further questions."

Rather than request the UAW to file a grievance, contest the contents of their personnel records, or utilize the UAW's internal union appeals procedure, the Committee responded to Rodgers' April 10 letter by filing two sets of unfair labor practice charges against both the Union and Budd. The National Labor Relations Board's Regional Director dismissed both sets of charges. In the Regional Director's October 30, 1984 dismissal letter of the second group of charges, he found:

> [T]he investigation failed to disclose sufficient evidence to establish that the Union's reasons for not pursuing such formal grievances were arbitrary, capricious, or invidious.

In February 1985, the petitioners sought again to apply for preferential hire at the surviving Budd plants, but this time by means of letters, rather than through formal Budd applications. By this time Budd no longer accepted mailed applications for preferential hires. Moreover, Budd never accepted letter applications instead of its own application forms. By February 1985, 14 of the petitioners had also lost their seniority rights by operation of the collective bargaining agreements. Once these petitioners lost their seniority rights, they lost their right to grieve or assert a breach of contract.

Not having received a response from Budd, the Committee requested in April 1985 that the Union file grievances concerning its members' failure to obtain employment. Rodgers declined to pursue such grievances because he thought the petitioners' February 1985 "applications" were *both* untimely and without merit. Rodgers based his conclusions on the language of the bargaining agreements, his investigation of similar complaints one year earlier, and the passage of time.

Petitioners filed their Complaint on June 17, 1985. At the close of discovery, both the Union and Budd successfully moved for Summary Judgment on several grounds. The District Court did not address some of these grounds, but concluded:[3] 1) the statute of limitations had run on petitioners' claims involving the Union's failure to grieve or arbitrate Budd's refusals to hire them at other plants from 1982

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3. On August 15, 1986, the District Court dismissed the claims of ten petitioners against the Union for failure to respond to interrogatories. The ten petitioners are Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L. M. Jackson, Leon Kennedy, Bennie Kennedy, Ronald Legett, Melvin Montgomery, and Jerome Nedoff. The petitioners did not timely appeal this dismissal to the Seventh Circuit.

through 1984; 2) although petitioners' complaint timely contested the Union's failure to grieve Budd's February 1985 denials of preferential hire, 14 petitioners had no standing to contest that denial against either Budd or the Union since they were no longer seniority employees of Budd, and therefore not covered by the collective bargaining agreement;[4] and 3) the remaining petitioners could not pursue their breach of contract claim because they could not prove that the Union breached its duty of fair representation. The Seventh Circuit affirmed the District Court's findings.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT THE APPROPRIATE CASE TO REVIEW THE SEVENTH CIRCUIT'S STANDARD FOR LIABILITY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION BECAUSE APPLICATION OF A DIFFERENT STANDARD WOULD NOT PRODUCE A DIFFERENT OUTCOME

The petitioners ask this Court to resolve the conflict in the circuit courts on the appropriate standard for determining whether a union has breached its duty of fair representation.[5] Given the facts of this case, such a request is

4. The 14 petitioners are Willie Ballard, Willie Bingham, Joyce Clark, Joseph Cruz, Louis Cruz, Michael Dawson, Melvin Page, John Perkins, Willie Smith, Jerome Tyron, Alfred Volk, Robert Weems, Leroy Williams, and Milton Wilson.

5. The 14 petitioners who were not seniority employees at the time of their April 1985 grievances have no standing to seek certiorari on this question. The District Court held that the 14 petitioners had no seniority rights on February 22, 1985 when they wrote to Budd requesting employment. After their seniority expired, "these employees were no longer members of the bargaining unit and were no longer covered by the provisions of the agreement." 125 LRRM (BNA) at 3211. As a result, the District Court concluded that "these employees had no standing to assert that Budd breached the collective bargaining agreement or that the Union breached its duty of fair representation." *Id.* The District Court's holding in this regard was affirmed by the Seventh Circuit, and the petitioners do not seek certiorari on that question.

inappropriate under the Court's principle of carefully choosing the cases to be given plenary review.

In the Seventh Circuit, "mere negligence" or even "gross negligence" on the part of a union is insufficient to support an action for breach of the duty of fair representation. Employees must show instead that a union engaged in "intentional misconduct." *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 243 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986). Although perfunctory handling of a grievance may be sufficient to establish liability in the other circuits (*see, e.g., Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1091 (9th Cir. 1978); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980); and *Curtis v. United Transportation Union*, 700 F.2d 457, 458 (8th Cir. 1983)), such conduct is not sufficient to establish liability in the Seventh Circuit.

The Court should not grant the Writ since petitioners would not be entitled to a remedy under the standard of any of the other circuits. The Union's decision not to process the petitioners' grievances was not perfunctory. Rather, the Union's decision was based on a reasonable interpretation of the collective bargaining agreement.

Furthermore, the Seventh Circuit's conclusion can be affirmed on other grounds without regard to the questions raised in the Petition. First, the petitioners cannot prove that Budd breached its collective bargaining agreements with the Union by refusing to employ them in response to their February 1985 letter "applications." Second, the petitioners failed to exhaust their internal union remedies, which meet the standards set forth in *Clayton v. International Union, UAW*, 451 U.S. 679, 689 (1981). These grounds, having been raised by the UAW and Budd below, can support the Summary Judgment. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

Thus, applying the standards of the other circuits would not change the result in this case. In the interest of the

sound administration of justice, this Court should resolve the conflict in the circuits, if at all, in a Seventh Circuit case where the Union prevailed despite its perfunctory handling of a grievance. Additionally, a matter in which a union's standard of liability is the only controlling question of law would be a more appropriate case to grant certiorari. The Court previously declined to review the Seventh Circuit's standard for determining a breach of a union's duty of fair representation in *Camacho v. Ritz Carlton Water Tower,* 786 F.2d 242 (7th Cir.), *cert. denied,* 477 U.S. 908 (1986).

A. The Union's Conduct Is Not Sufficient To Establish Liability Under the Law of the Other Circuits

The petitioners can not prevail under the more liberal standards in the other circuits for determining a breach of the union's duty of fair representation. In order to prevail in an action asserting a breach of contract, an employee must demonstrate that his employer breached the collective bargaining agreement and his union breached its statutory duty of fair representation. *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 570-571 (1976). A breach of the union's statutory duty of fair representation occurs only when its conduct is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 191 (1967).

Employees do not have an absolute right to have their grievances taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. *Vaca v. Sipes,* 386 U.S. at 191. In processing grievances, unions have been accorded a "wide range of reasonableness" in serving the unit it represents. *Ford Motor Company v. Huffman,* 345 U.S. 330, 339 (1953).

Certain uniform principles have been adopted by the courts in analyzing whether a union breached its duty of fair representation. A union is not liable for mere errors in judgment that were made in honesty and in good faith. *Ford Motor Co. v. Huffman,* 345 U.S. at 338; *NLRB v. American*

Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980). Ordinary negligence, without more, cannot establish a breach of duty of fair representation. *See Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1212 (6th Cir. 1981) and cases cited therein. The simple fact that the grievances may have been meritorious does not entitle an employee to a remedy. *Vaca v. Sipes*, 386 U.S. at 191.

The circuit courts have been particularly deferential to a union's actions where its judgment and advocacy, rather than its ministerial actions, are at issue. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983); *Tedford v. Peabody Coal Company*, 533 F.2d 952, 957 (5th Cir. 1976); *Bazarte v. United Transportation Union*, 429 F.2d 868, 872 (3d Cir. 1970). In this regard, Judge Reinhardt noted in *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986):

> We have said that a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. (Citation omitted). In short, we do not attempt to second guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued.

In the instant case, the only conduct that can be evaluated is the Union's failure to grieve petitioners' claims involving Budd's alleged violations of the collective bargaining agreement in 1985. A review of all other actions by the Union is time-barred. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 171 (1983). In evaluating the Union's actions in 1985, events outside the six-month limitations period may be utilized as background. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. NLRB*, 362 U.S. 411, 417 (1960). However, conduct within the limitations period cannot be deemed to be an unfair labor practice merely on the basis of such evidence. *Id.*

Petitioners' allegations boil down to their disagreement with the Union's interpretation of its collective bargaining agreement with Budd. Rodgers declined to file grievances in part because none of the petitioners properly applied for employment and certain petitioners had no seniority rights. Budd never accepted letters as employment applications. Likewise, by 1985, Budd no longer accepted preferential hire applications submitted by mail. By that time, the seniority rights of 14 petitioners expired. These individuals had lost their rights under the collective bargaining agreement, including the right to file grievances.

Rodgers did not believe petitioners' 1985 grievances were timely because the grievances merely sought to revive complaints about Budd's decisions made significantly more than one year earlier. By the terms of the preferential hiring appeal procedure, an employment rejection must be appealed within thirty (30) calendar days of the employees' receipt of the rejection. Petitioners knew in April 1984 that Budd had concluded they were unemployable and were aware of the reasons supporting this conclusion. Petitioners had no reasonable expectation that Budd would act differently on their February 1985 "applications."

Rodgers also declined to file grievances because he had investigated petitioners' identical claims one year earlier and concluded that, given the language of the preferential hiring letter, their claims were without contractual support. Rodgers thought the arbitration of petitioners' grievances would be futile since Budd retained the absolute right to establish local plant eligibility standards and to reject employees because of their poor Gary plant disciplinary and/or attendance records.

Rodgers performed no independent investigation of Budd's decision to reject petitioners for employment because the preferential hiring agreements permitted Budd to consider their Gary plant work history in evaluating their applications. Petitioners never offered any evidence that

Rodgers' view of the preferential hiring agreement was in bad faith. They simply disagreed with it. Furthermore, petitioners never contested the correctness of their Gary employment records that Rodgers submitted to them. Nevertheless, Rodgers would have discovered no information in a more extensive investigation that would have altered his interpretation of the contract, and thus, changed his decision not to process the grievances. *See Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1393 (9th Cir. 1985) (Union fulfilled its duty to perform minimal investigation when further investigation would not have aided in its decision not to pursue the grievance).[6]

In short, petitioners would not have prevailed if this action had been brought in a different circuit. The Union did not breach its duty of fair representation under the undisputed standards concerning a union's conduct. Rodgers' interpretation of the preferential hiring provisions of the collective bargaining agreement was reasonable and was not made in disregard of petitioners' rights.[7] The Union's agreement with Budd's interpretation of these contractual provisions is not evidence of a breach of duty of fair repre-

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6. Rodgers performed his investigation in March and April 1984. Assuming *arguendo* that the investigation did not fulfill the Union's duty of fair representation, petitioners cannot contest this conduct through their complaint filed in June 1985. *Ray Lewis v. Local Union No. 100, Laborers International Union*, 750 F.2d 1368, 1379 (7th Cir. 1984).

7. In this regard, the Seventh Circuit concluded that "taken in its best light, however, the evidence here can only support a claim of inferior representation." Although the Seventh Circuit noted that Rodgers' actions "may have been perfunctory," the Court's characterization of Rodgers' conduct clearly demonstrates that he was neither grossly negligent nor acting in bad faith. Accordingly, the Seventh Circuit uses the term "perfunctory representation" as a synonym of "inferior representation", which would not have entitled petitioners to a remedy in any circuit, rather than as a synonym for "grossly negligent representation," as have the other circuits. *E.g., Robesky v. Qantas Empire Airways Limited*, 575 F.2d at 1090; *Ruzicka v. General Motors Corp.*, 649 F.2d at 1212; and *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d at 891.

sentation, even if the grievances were meritorious. *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 637 (9th Cir. 1988); *Bazarte v. United Transportation Union*, 429 F.2d 868, 872 (3d Cir. 1970). Moreover, the Union is not liable, even if its representation was unfair or deficient, since the grievances were not timely under the collective bargaining agreement. *Ethier v. United States Postal Service*, 590 F.2d 733, 736 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979).

B. The Seventh Circuit's Judgment Can Be Affirmed Without Regard to the Questions Raised In the Petition.

The Writ should also be denied because the Seventh Circuit's judgment can be affirmed on the existing record on arguments made to the courts below without reaching the questions raised in the Petition.[8] *See Dandridge v. Williams*, 397 U.S. at 475 n.6. Petitioners cannot demonstrate that Budd violated its collective bargaining agreement with the UAW in refusing to hire them in response to their February 1985 attempts to apply by mail. To prevail against the Company, the petitioners must show that Budd's failure to rehire them breached its collective bargaining agreements with the UAW. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 570-571.

By February 1985, the right of Gary employees to apply at the surviving Budd plants by mail had expired. In order to be considered for employment a former Gary employee had to apply in person. None of the petitioners applied in person in February 1985 at any of the surviving Budd plants.

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8. Budd argued to both the District Court and the Seventh Circuit that Summary Judgment for it was appropriate because petitioners did not exhaust their internal union remedies and the Company did not breach the collective bargaining agreement. The Seventh Circuit concluded that petitioners did not exhaust their intra-union remedies, but declined to affirm the Judgment on this ground because the District Court made no findings on the *Clayton* elements. Neither the District Court nor the Seventh Circuit addressed the breach of contract question.

Moreover, Budd plants required a fully completed application form, and never accepted a letter as an application.

Additionally, Budd did not violate the preferential hiring provisions of the collective bargaining agreement by refusing to rehire the 14 petitioners whose seniority rights had expired. The preferential hire provisions of the Agreement only provided rights to applicants who retained contractual seniority. Moreover, those 14 petitioners had no standing to assert a breach of contract since they were no longer considered employees.

The Seventh Circuit's Judgment was also appropriate because plaintiffs failed to exhaust the internal union appeals procedure. This Court has held that exhaustion of internal union appeals is a precondition to obtaining a remedy for a union's breach of duty of fair representation if: (1) the employee can obtain a fair hearing from the Union on the claim; (2) the procedure can result in either reactivation of the grievance or otherwise provide full relief; and (3) the procedure does not unreasonably delay access to judicial remedies. *Clayton v. International Union, UAW*, 451 U.S. at 689. All of the *Clayton* elements are present in the instant case.

First, petitioners could have obtained a fair and impartial hearing through the Union's internal appeals procedure. The UAW's internal appeal procedure set forth in Article 33 of its International Constitution, provides, *inter alia:*

> Where the challenge is against an . . . international officer or department the levels of appeal are first to the International Executive Board, and then to the Convention Appeals Committee, or where appropriate to the Public Review Board.

In most cases an appeal to the International Executive Board (hereinafter "IEB") results in a hearing. At the hearing, the union member has a right to be represented by counsel, present evidence, and submit a brief. (UAW Con-

stitution, Article 33, Section 3(d)). Decisions of the IEB may be appealed to either the UAW Convention Appeals Committee or the Public Review Board. The Convention Appeals Committee, composed of delegates to the UAW's triannual convention, meets at least semiannually. (UAW Constitution, Article 33, Section 3(e)). The Public Review Board, consisting of seven individuals who are not employed by the UAW, has the authority to handle appeals from the IEB where a member alleges his grievance was improperly handled because of "fraud, discrimination or collusion with management" or that the disposition or handling of the matter was "devoid of any rational basis." (UAW Constitution, Article 33, Section 4(1)).

Petitioners presented no evidence of any hostility on the part of Union officials that would have precluded a fair hearing on their claims. Thus, the UAW internal appeals procedure could have provided a fair and impartial resolution of petitioners' complaints.

Secondly, a successfully filed intra-union appeal can cause a grievance to be reinstated to the appropriate step in Budd's contractual grievance procedure, under which the grievant would be able to seek full relief of his claim. Document No. 36 of the National Agreement provides:

> However, in those instances where the International Union, UAW, by either its Executive Board, Public Review Board, or Convention Appeals Committee has reviewed the disposition of a grievance and found that such disposition was improperly effected by the Union or a Union representative involved, the Budd Department of the International Union may inform the Company's Corporate Manager of Labor Relations in writing that such grievance is reinstated in the grievance procedure at the step at which the original disposition of the grievance occurred.

Finally, several courts have reviewed the sufficiency of the UAW internal appeals procedure and have concluded that it meets the *Clayton* requirements. *E.g., Wozniak v.*

U.A.W. Local 897, 842 F.2d 633, 636 (2d Cir. 1988); *Monroe v. International Union, UAW*, 723 F.2d 22, 26 (6th Cir. 1983), and *Miller v. General Motors Corp.*, 675 F.2d 146, 150 (7th Cir. 1982).

II. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT PETITIONERS' COMPLAINT WAS NOT TIMELY CONCERNING CLAIMS ARISING BETWEEN 1982 AND 1984.

Contrary to Petitioners' assertions, the Seventh Circuit correctly concluded that the petitioners' continuing violation theory did not support their assertions that their June 1985 Complaint could timely raise claims arising from Budd's and the Union's actions in 1982 through 1984.[9]

It is well-established that continuing violations of Section 301 of the Labor-Management Relations Act do not make alleged violations occurring six months beyond the filing of a complaint actionable. *Ray Lewis v. Local Union No. 100, Laborers*, 750 F.2d 1368, 1379 (7th Cir. 1984). Rather, continuing violations of Section 301 only toll the limitations period so that each time a violation occurs, a new cause of action accrues. *Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d 570, 575 (6th Cir. 1986). As a result, alleged violations occurring beyond six months from the filing of the complaint remain time-barred. *Ray Lewis v. Local Union No. 100*, 750 F.2d at 1379; *Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d at 575. For this reason, the District Court and the Seventh Circuit correctly dismissed as untimely all claims except those based upon Budd's refusal to hire petitioners following receipt of their February 1985 letter "applications."

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9. The case will be closed as to the 14 petitioners who no longer have seniority rights if this Court does not accept certiorari on petitioners' question concerning this issue, but accepts certiorari on petitioners' other question.

III. CONCLUSION

For the reasons stated above, application of the standard of liability of the other circuits for breach of a union's duty of fair representation would not change the result in this case. In the interest of the sound and efficient administration of justice, this Court should deny the Petition for a Writ of Certiorari and evaluate the conflict in the circuits, if at all, in another case.

Respectfully submitted,

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APPENDICES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY C. ADAMS, JR., et al., Plaintiffs	:	
v.	:	CIVIL NO. H 85-556
THE BUDD COMPANY, et al., Defendants	:	

ORDER

This matter comes before the court on the Union Defendants' Motion for Protective Order which was filed on July 18, 1986; the plaintiffs' Motion for Sanctions which was filed on August 1, 1986; the plaintiffs' Motion to Shorten the Time within which Defendants UAW and the Budd Company Must Produce Documents in Response to Plaintiffs' Deposition Notices which was filed on August 11, 1986; and on the Union Defendants' Renewed Motions to Dismiss and to Compel Answers to Interrogatories which motions were filed on August 12, 1986.

I.

By their Motion for Protective Order, the union defendants seek a protective order to prevent any attempt by the plaintiffs to seek sanctions for the union defendants' failure to produce Tom Rodgers for a deposition on July 18, 1986 in Detroit, Michigan. As anticipated by the union defendants, the plaintiffs filed a Motion for Sanctions on August 1, 1986.

On June 30, 1986, the union defendants received notice of the deposition of Thomas G. Rodgers, an employee of the UAW. The notice directed Rodgers to produce documents at

the deposition on July 18, 1986. The plaintiffs also served a notice, pursuant to Fed.R.Civ.P. Rule 30(b)(6), requesting the UAW to designate a person to testify on its behalf about the contents of the documents they requested of Rodgers. Because Rodgers had not received the 30 days notice as required by Fed.R.Civ.P. Rule 34, the union defendants notified the plaintiffs' attorney that they would refuse to produce the documents at the deposition. The plaintiffs' attorney responded that he was not inclined to travel to Detroit to depose Rodgers if the defendants would not simultaneously produce the requested documents. The union defendants' attorney agreed to try to arrange a different date for the Rodgers' deposition although the plaintiffs' attorney contends he did not expressly agree to cancel the July 18, 1986 deposition. The attorneys had subsequent negotiations about rescheduling the deposition but ultimately, the plaintiffs' attorneys appeared for the deposition and neither Rodgers nor a designee of UAW did appear.

On the scheduled deposition date, the union defendants moved for a protective order against sanctions for their failure to appear and on August 1, 1986, the plaintiffs filed a motion requesting sanctions. These motions fail to comply with N.D. Ind. Rule 7(e) which states that

> the court will refuse to rule on or will deny any and all motions related to discovery unless moving counsel refers to this rule and state in the motion that, after personal meeting and consultation and sincere attempts to resolve differences, counsel are unable to reach an accord. This statement shall recite, in addition, the date, the time, and the place of such personal conference, and the names of all individuals attending.

The parties conduct in this discovery matter evidences a complete lack of any sincere attempts to resolve differences. Thus, they have failed to adhere to the letter, as well as the intent, of N.D. Ind. Rule 7(e) and the Motion for Protective Order and Motion for Sanctions will be DENIED.

II.

The plaintiffs have also filed a Motion to Shorten Time Within Which Defendants UAW and The Budd Company Must Produce Document in Response to Plaintiffs' Deposition Notices. Because this motion also fails to comply with N.D. Ind. Rule 7(e), it will likewise be DENIED.

III.

The union defendants have filed a Renewed Motion to Compel Answers to Interrogatories referring to Rule 7(e) and stating that the union defendants met with the plaintiffs in order to obtain responses to Interrogatories 4 and 8(c) of union defendants' interrogatories to plaintiffs. At the meeting, the plaintiffs voiced no objection to the interrogatories and agreed to answer them but have not yet fulfilled this agreement.

The interrogatories were served on the plaintiffs on August 22, 1985 and by agreement the date for responding was extended to February 20, 1986. The Federal Rules of Civil Procedure require a party on whom interrogatories are served to serve answers or objections within 30 days after service of the interrogatories. Fed.R.Civ.P. Rule 33(a). The plaintiffs have ignored the time limits imposed by the Federal Rules and by their own agreement. Therefore, the union defendants' Motion to Compel Discovery will be GRANTED. At this time the court will DENY the union defendants' request for reimbursement of the expenses of seeking an order to compel discovery. The union defendants are granted leave to renew that request if the plaintiffs fail to comply strictly with the terms of this Order.

IV.

The union defendants have also filed a Renewed Motion to Dismiss, referring to Rule 7(e) and stating that the union

defendants met with the plaintiffs in order to obtain their responses to the union defendants' interrogatories. At the meeting, counsel for the plaintiffs assured the union defendants that the responses of plaintiffs Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, and Jerome Nedoff would be immediately forthcoming. Despite this assurance, these plaintiffs have not yet answered the interrogatories.

The interrogatories were served on the plaintiffs on August 22, 1985 and by agreement the date for responding was extended to February 20, 1986. As stated above, the Federal Rules require answers or objections to interrogatories within 30 days after service of the interrogatories. Fed.R.Civ.P. Rule 33(a).

Fed.R.Civ.P. Rule 37(d) permits this court to impose sanctions on a party for failure to serve answers or objections to interrogatories after proper service of the interrogatories. Available sanctions include an order striking out pleadings or dismissing the action. Fed.R.Civ.P. Rule 37(b)(2)(c) and (d). The court has wide discretion in the imposition of appropriate sanctions. *Ntl. Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Ntl. Hockey League*, 427 U.S. at 643.

The court finds it appropriate under these circumstances to dismiss the claims of the recalcitrant parties. The discovery cut-off date is set as September 1, 1986 and an order merely compelling the plaintiffs to answer entire sets of interrogatories would prejudice the union defendants by leaving them with inadequate time to conduct follow-up discovery. Therefore, dismissal is the only effective remedy remaining.

CONCLUSION

Because of noncompliance with N.D. Ind. Rule 7(e), the Union Defendants' Motion for Protection Order, the plaintiffs' Motion for Sanctions, and the plaintiffs' Motion to Shorten the Time are DENIED.

The Union Defendants' Renewed Motion to Compel Answers to Interrogatories is GRANTED. Plaintiffs Henry C. Adams, Jr., Willie Ballard, Robert Bernal, George Berry, Willie Bingham, Joyce Clark, Willie J. Cornelius, Joseph Cruz, Louis Cruz, Jr., Michael Dawson, Melvin R. Page, John W. Perkins, Willie H. Smith, Malcolm Tucker, Jerome Tyron, Robert Walker, Sr., Robert Weems, Emanuel Williams, Leroy Williams, Milton Wilson and Alfred D. Volk to answer interrogatories 4 and 8(c) within five days of receipt of this Order.

The Union Defendants' Renewed Motion to Dismiss is GRANTED. The claims of plaintiffs Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, and Jerome Nedoff against the union defendants are hereby DISMISSED WITH PREJUDICE.

ENTER: August 15, 1986

s/ Hon. James T. Moody

JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY C. ADAMS, JR., et al., Plaintiffs	:	
v.	:	CIVIL NO. H 85-556
THE BUDD COMPANY, et al., Defendants	:	

ORDER

This matter comes before the court on the plaintiffs' Motion to Amend, Alter or Vacate the Court's Order of August 21, 1986, Which Dismissed Certain Plaintiffs as to the Union Defendant, and a Request for Leave of Court to File Answers to Union Defendant's First Interrogatories as to Certain Plaintiffs' which motion was filed on August 29, 1986. On August 21, 1986, the court granted the defendants' motion to dismiss the claims of Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, and Jerome Nedoff against the union defendants. The court found that the union defendants had served the plaintiffs with interrogatories on August 22, 1985, and, as of August 21, 1986, these plaintiffs had not yet responded. Therefore, the court dismissed the claims of these plaintiffs against the union defendants pursuant to Fed.R.Civ.P. Rule 37(d).

The plaintiffs now ask the court to vacate the dismissal and allow them leave of court to answer the interrogatories. The plaintiffs have offered a panoply of common excuses for failing to comply with discovery requests. None of the excuses justifies their recalcitrant conduct and hence the judgment of dismissal is warranted.

CONCLUSION

For reasons discussed above, the plaintiffs' Motion to Amend, Alter or Vacate the Court's Order of August 21, 1986 Which Dismissed Certain Plaintiffs as to the Union Defendants, and Request for Leave of Court to File Answers to Union Defendant's First Interrogatories as to Certain Plaintiffs are DENIED.

ENTER: September 23, 1986

s/ Hon. James T. Moody

JUDGE, UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-746

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

HENRY ADAMS, *et al.*,
Petitioners,

v.

THE BUDD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether proof that a union breached its duty of fair representation requires evidence of Union bad faith where the Union's actions were based on its reasoned interpretation of the governing contract.

2. Whether application of the six-month statute of limitations for hybrid Section 301/duty of fair representation claims precludes a finding of liability based on alleged violations occurring outside the six-month period.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-746

HENRY ADAMS, *et al.*,
Petitioners,

v.

THE BUDD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) provides in relevant part:

> (a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties . . .

Section 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b) provides in relevant part:

> (b) *Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

STATEMENT OF THE CASE

Petitioners are thirty-one former employees at the Budd Company's manufacturing facility in Gary, Indiana. The Budd Company closed the Gary plant in November, 1982. After the plant closed, Petitioners applied for positions at surviving Budd facilities in Philadelphia and other locations. These applications were filed under various preferential hire provisions of the collective bargaining agreement between Budd and Petitioners' union representatives, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 1122. Petitioners' applications were denied by the Budd Company. The UAW declined to pursue grievances on their behalf challenging Budd's refusal to hire them.

On June 17, 1985, Petitioners filed a complaint in federal court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The complaint alleged that the Company's refusal to hire them violated the preferential hire provisions of the collective bargaining agreement and that the Union's refusal to grieve the denial of their employment applications violated the Unions' duty of fair representation.

The collective bargaining agreement involved included the 1980 National Agreement between Budd and the UAW, a Local Agreement between Budd and Local 1122, and additional agreements relating to the Gary plant

closing.[1] Document 12 of the 1980 National Agreement enabled a laid-off "seniority employee" to obtain preferential hiring consideration for openings at another Budd facility to which application was properly made. The agreement provided, in relevant part:

> Upon his making application for employment, the company will give preference over other applicants to a seniority employee who is laid off from one of the plants covered by this agreement at another plant covered by this agreement. . . . *Applicants* for employment under the above *must meet all of the local plant's hiring eligibility requirements* . . . [Emphasis supplied]

(Kroger Aff., Ex. A)[2] This language has been contained in Budd-UAW agreements since 1971. (Kroger Aff., Para. 5)

Under this language, laid-off employees were entitled to preferential consideration for employment at other Budd plants, but Budd reserved sole discretion to establish "local plant hiring eligibility requirements" and to reject employees on the basis of these local standards. (Rodgers Aff., Para. 6, UAW MSJ App.) During negotiations for the 1980 agreement, the UAW attempted to strengthen employee preferential hiring rights by in-

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[1] These documents appear as Exhibits 3 and 4 respectively in the appendix of exhibits filed by the Company in the district court with its motion for summary judgment. The National and Local Agreements appear as Exhibits A and B to the UAW's MSJ Appendix.

[2] With their motions for summary judgment in the district court, both the Company and Union filed separately bound appendices of exhibts, deposition excerpts and affidavits. In addition, the Company filed a separately bound affidavit of William M. Kroger with attached exhibits. The references to record material in the remainder of this brief are to these volumes. References to material in the Company's appendix will be "Ex. ——, Budd MSJ App." References to materials in the Union appendix will be "Ex. ——" or "—— Dep." or "—— Aff." "UAW MSJ App." References to the affidavit of William Kroger will be "Kroger Aff. ——."

serting language requiring Budd to accept an application for preferential hiring unless there was just cause for denying the application. (*Id.*, Para. 7). Budd, however, refused to accept the UAW's proposal, and the more discretionary language permitting Budd to establish and enforce local hiring eligibility requirements was retained in the final contract. (*Id.*, Kroger Aff., Para. 6)

In anticipation of the closing of the Gary plant, the Union negotiated a supplemental letter agreement which permitted laid-off Gary employees to obtain employment applications for other Budd facilities from a personnel office to be maintained in Gary for at least a year after the plant closed, to submit applications by mail, and to take pre-employment physical examinations in the Gary area, instead of having to travel to the new facility without any assurance of a job. (Rodgers Dep. 34-35, 325; UAW MSJ App.) The supplemental agreement retained the eligibility requirements of the 1980 National Agreement, by providing for preference for applicants "after it has been determined that they meet all of the local plant hiring eligibility requirements." (Ex. C., UAW MSJ App.) The special application procedures for Gary employees expired by their terms when Budd terminated its personnel activity in the Gary area on August 1, 1984. (Ex. 95, Budd MSJ App.)

Between 1982 and 1984 approximately 550 applications by former Gary employees were submitted for openings at surviving Budd plants. (Kroger Aff., Para. 16) In determining whether each applicant met the local hiring eligibility requirements, Budd considered, where available, the past work record of the applicant. Employees were rejected if their application showed a pattern of absenteeism and lateness, disciplinary actions, or off-the-job accident/disability claims. (*Id.* Para. 17) As a result of this process of evaluation, one hundred sixty (160) employees were hired at other Budd plants. (*Id.* Para. 18)

Petitioners submitted unsuccessful applications for employment between 1982 and 1985. (App. E to Petition for Writ of Certiorari) Unhappy with the results of the application procedure, they formed the "Committee of Former Budd Company Employees" in 1984 to represent them in their claims under the preferential hire agreement. (Williams Dep. 8, 11-12, UAW MSJ App.) Several plaintiffs in their own name or in the name of the Committee wrote to various officials of the International Union protesting Budd's application of the preferential hire provisions and requesting assistance. (Williams Dep. Ex. 2, 3; UAW MSJ App., Ex. 18; Budd MSJ App.) These various complaints and requests were channeled to Tom Rodgers, a UAW International Representative charged with the overall duty of enforcing the UAW-Budd collective bargaining agreement. (Rodgers Dep. 20, UAW MSJ App.)

Rodgers requested information on employees whose names had been supplied to him, including those who had signed letters complaining about Budd's action. As a result of these inquiries, Rodgers learned that these individuals were rejected based on local hiring eligibility requirements because of records of absenteeism, discipline, or off-work disability claims. (Rodgers Aff., Para. 19, UAW MSJ App.) In Rodgers' view, based on his understanding of the preferential hiring agreement, the Company had discretion to reject applications on this basis.[3] (Rodgers Aff., Para. 21) Rodgers communicated

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[3] From 1982 to 1985, the Union requested and/or received information from the Company relating to fourteen of the plaintiffs in this action and another twenty (20) former Gary employees who are not plaintiffs here. (Kroger Aff., Ex. G) As a result of UAW efforts, eleven (11) employees who were initially rejected, were eventually hired. (*Id.*, Para. 22) There is no evidence that the Union refused to confirm the circumstances relating to any employee requesting an inquiry prior to the form letter grievances of April 6, 1985.

the results of his inquiry to the Committee on April 10, 1984. (Rodgers Aff., Ex. 7, UAW MSJ App.)

Following receipt of Rodgers' letter, plaintiffs filed a series of administrative charges against Budd and the UAW. (Williams Dep. Ex. 5, 9; Davis Aff., Ex. 1-24, UAW MSJ App.) These charges and material submitted to support them revealed plaintiffs' interpretation of the Rodgers' letter of April 10, 1984, as an unequivocal refusal to represent them.

On February 22, 1985, Petitioners' counsel wrote the Company, attaching form letters from Petitioners requesting employment under the preferential hiring clause. (Budd MSJ App. Ex. 106-109) By this time, at least fifteen of the plaintiffs had already broken seniority under the terms of the Local Agreement and were not eligible for consideration under the preferential hiring clause. (Para. 68(e), Ex. B, UAW MSJ App.) Moreover, the Gary area personnel office had closed the previous summer, and mailed applications for preferential hire were no longer being accepted. (Kroger Aff., Para. 14)

After the Company's rejection of these applications, plaintiffs wrote the Union in similar form letter fashion on April 6, 1985, stating in all letters that the Union should consider the letter a grievance of the Company's denial of their February 22, 1985 applications. (Rodgers Aff., Exs. 8.1-8.32, UAW MSJ App.)

Rodgers declined to file grievances over the Company's denial of plaintiffs' February 1985 applications because they were both untimely and without merit. (Rodgers Aff., Para. 21, UAW MSJ App.) As Rodgers stated in his affidavit:

> [P]laintiffs had long been aware that their unsatisfactory work records were the basis for the denial. Second, it was also my judgment that the grievances were without merit and that arbitration would have

> been a futile endeavor, in that the National Agreement gave Budd sole discretion to establish local hiring standards. It was my interpertation of the preferential hire provision that an individual's prior work record could legitimately be considered by Budd in its determination of whether the individual met the local eligibility requirements.

This opinion as to the merits of plaintiffs' "grievances" was based on his understanding of the language and bargaining history of the preferential hiring clause. (*Id.*, Paras. 6 and 7).[4]

The Complaint in this case was filed on June 17, 1985. After discovery, the Company and the Union moved for summary judgment. The district court granted these motions, ruling that (1) plaintiffs' claims relating to Company and Union denials between 1982 and 1984 were barred by the six-month statute of limitations applicable to hybrid Section 301/duty of fair representation cases; (2) fifteen plaintiffs failed to establish a claim based on their 1985 applications because by that time their seniority rights had expired, and they had no continuing rights under the preferential hire provisions;[5] and (3) the undisputed evidence showed that the Union had not

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[4] Petitioners assert in their Petition that they filed over 100 grievances. In fact, the chart prepared by plaintiffs and attached to their Petition, indicates that, with very few exceptions, the only grievances each plaintiff claims to have filed are some or all of the six inquiry or demand letters mailed by the Committee to various union representatives on February 29, 1984, March 7, 1984, March 26, 1984, July 10, 1984, February 23, 1985, April 6, 1985. The record shows that the Union did file a grievance for plaintiff L. M. Jackson in 1983 which was denied based on the Company's right to rely on its local hiring standards. (Kroger Aff., Para. 20, Ex. F)

[5] In its motion for summary judgment the Union addressed the claims of only twenty-one of the Petitioners. The remaining ten had been dismissed by the court for repeated failures to answer Union interrogatories. Plaintiffs failed to preserve their objection to this dismissal by proper argument to the Seventh Circuit.

violated its duty of fair representation with respect to the remaining plaintiffs. The Petitioners appealed to the Seventh Circuit, which affirmed the district court decision on all points with a published opinion issued on May 5, 1988. *Adams v. Budd Co.*, 846 F.2d 428 (7th Cir. 1988).

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Ruling That The Union Did Not Breach Its Duty Of Fair Representation On The Facts Of This Case Is Not In Conflict With The Decisions Of This Court Or Of Other Courts Of Appeal.

A. The Result Reached Is Consistent With Supreme Court Precedent.

The Court held in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), that a union, as the exclusive bargaining representative of employees, has "a statutory duty fairly to represent all of those employees" in the course of collective bargaining and in enforcement of its collective bargaining agreement through grievance/arbitration procedures. *See also Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953);[6] *Humphrey v. Moore*, 375 U.S. 335 (1964); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). The Court described a union's duty as follows:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with com-

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[6] In *Ford Motor Co. v. Huffman*, the Court noted that a collective bargaining agreement will inevitably affect certain employees or groups of employees differently and that "the complete satisfaction of all who are represented is hardly to be expected." For this reason, a union is afforded a "wide range of reasonableness" in discharging its function as collective bargaining representative subject to "complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

> plete good faith and honesty and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. at 177. The duty of fair representation is breached only where the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Id.*, at 190.

The *Vaca* decision focused on the requisite proof of a breach of the duty of fair representation in the context of grievance handling. According to the Court, it was not enough to prove that the union failed to pursue a grievance to arbitration or that the grievance was meritorious. Under *Vaca*, a court will not second-guess the union's evaluation of the merits of a grievance absent evidence that the union was "personally hostile" to the grievant or that "the union acted at any time other than in good faith." *Id.*, at 194. A union that can explain its actions based on its good faith evaluation of the merits of a grievance does not breach its duty to the employees it represents.

Since *Vaca*, the Court has not again had occasion to consider whether any specific union conduct violates the duty of fair representation. However, it has characterized and expounded on its holding in *Vaca* in the course of resolving issues in other contexts.

Thus, in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), a case involving issues of NLRB preemption, the Court distinguished the individual's preempted claim in that case from the judicially cognizable duty of fair representation claim discussed in *Vaca*. The Court concluded that Lockridge had not stated a claim for breach of the duty of fair representation, stating:

> For such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' There must be 'substantial evi-

> dence of fraud, deceitful action or dishonest conduct' [Citations omitted]

403 U.S. at 299. According to the Court, the purpose of judicial enforcement of the duty of fair representation was to assure that "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." *Id.*, at 301.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), the Court held that the plaintiffs were entitled to relief against the employer from an otherwise final arbitration decision if they proved at trial that the union breached its duty of fair representation in the course of the arbitration proceeding. The Court concluded:

> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause . . . But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been *dishonest, in bad faith, or discriminatory.* [Emphasis supplied]

424 U.S. at 571. In *Hines* plaintiffs presented an issue for trial under this standard with evidence that the charges against them were false, that they were assured by the union that they were being taken care of, that the union's representation was nevertheless completely perfunctory, and that there existed political antagonism between local union officials and plaintiffs. 424 U.S. at 559 n. 4. Thus the Court noted that the duty of fair representation can be breached not only where the union ignores a meritorious grievance but also where it processes a meritorious grievance "in a perfunctory fashion." *Id.*, at 569.

Petitioners assert that the Seventh Circuit's decision in this case incorrectly applies the precedent of *Vaca*. However, the record makes clear that the real disagree-

ment between Petitioners and the Union concerned their different interpretation of the preferential hire provisions of the collective bargaining agreement. The Union believed that the preferential hire provisions allowed the Company to set its own local hiring eligibility requirements at each of its plants and to deny Petitioners' applications based on whatever requirements they set. The Union determined upon inquiry in each case that the Company was rejecting applicants based on past records of absenteeism, discipline, or off-work disability claims and concluded that this was within the Company's contractual right. Its conclusion was supported by bargaining history which showed that attempts to limit Company discretion in past contract negotiations had failed.

Throughout these proceedings, Petitioners have claimed that the Union erred in allowing the Company to exercise such broad discretion in setting and enforcing the local hiring requirements.[7] Yet it is undisputed on the record that the Union believed in good faith that the contract permitted the Company to exercise that discretion, and it is further undisputed that the Union had no ill will towards Petitioners that would have motivated it to ignore otherwise meritorious claims.

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[7] In opposition to Company and Union motions for summary judgment, Petitioners briefed the issue whether the Company violated the collective bargaining agreement by rejecting their applications for employment. (*See* Plaintiffs' Appendix in the Seventh Circuit, at 548-555.) They contended that the Company breached the Preferential Hire Agreement by (1) relying on old disciplinary records kept in violation of the Local Agreement, (2) by effectively terminating their employment rights without just cause and without advance notice of the rules to be applied, (3) by failing to accord them a real preference over employees outside Budd for whom such complete employment history was not available, and (4) by applying local hiring requirements that were unreasonable and failed to measure their ability to perform available jobs. All of these arguments depend on the degree of discretion accorded the Company under the contract as a matter of contract interpretation and not on evaluation of individual circumstances.

Under *Vaca*, the courts may not second-guess the Union's good faith interpretation of the governing contract, even if they believe the Union's legal judgment is unsound. Because the Union's actions here were based on a reasoned evaluation of contractual language as applied to Petitioners' grievances, and not on improper considerations unrelated to the Union's role as bargaining representative, the actions were neither arbitrary, discriminatory nor in bad faith within the clear holding of *Vaca*. Accordingly, the result reached by the Seventh Circuit in this case is fully supported by existing Supreme Court precedent and raises no substantial issue which requires further elucidation of applicable law by the Court.

B. The Decision Does Not Implicate A Conflict Between The Circuits Concerning Application Of The Duty Of Fair Representation To Arbitrary Union Conduct.

The standard for proof of breach of a union's duty of fair representation in the Seventh Circuit was established in *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981), as follows:

> An action based on a duty to fairly represent cannot be based solely on some action or omission by the union that results in an employee not receiving a "fair" hearing on the merits of a grievance. The legal action based on the union's duty to fairly represent might be more properly labeled as an action for the union intentionally causing harm to an employee involved in a grievance proceeding. The "duty" is not breached and the employee has no remedy without substantial evidence of fraud, deceitful action or dishonest conduct.

658 F.2d at 522, *citing Motor Coach Employees v. Lockridge*, 403 U.S. at 299, and *Humphrey v. Moore*, 375 U.S. at 348 (1964). Subsequent decisions of the Seventh Circuit have affirmed that the "intentional misconduct" test

formulated in *Hoffman* is the controlling standard in that circuit. *Grant v. Burlington Industries*, 832 F.2d 76 (7th Cir. 1987); *Superczynski v. P.T.O. Services*, 706 F.2d 200 (7th Cir. 1983); *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983); *Graf v. Elgin, Joliet & Eastern Railway*, 697 F.2d 771 (7th Cir. 1983); *Cote v. Eagle Stores*, 688 F.2d 32 (7th Cir. 1982), *cert. denied*, 459 U.S. 1218 (1983). In *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986), the court stated that intentional misconduct is:

> sabotaging a possibly meritorious grievance . . . because the worker is on the outs with the union or is a member of some racial or other minority or is not a union man.

Id. at 243. The intentional misconduct standard was applied by the Seventh Circuit in this case in ruling that the Union did not breach its duty of fair representation.

Petitioners contend that the Seventh Circuit's intentional misconduct standard applied in this case conflicts with decisions in other circuits which hold that unintentional failure to process a meritorious grievance can breach a union's duty of fair representation. Petitioners primarily rely on *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), *modified* 649 F.2d 1207 (6th Cir. 1981), *cert. denied*, 464 U.S. 982 (1983); and *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877.

What Petitioners ignore is that the cases where courts have found a breach of the duty of fair representation for unintentional union conduct are of a different type than this case. The instant case is one in which the Union based its actions on its reasoned interpretation of the relevant contract provisions. Courts which have con-

sidered the issue agree that evidence of bad faith is required to prove a breach of the union's duty in these circumstances. *See Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988). The cases on which Petitioners rely are not cases in which the union's reasoned evaluation of the merits of a grievance was at issue. Instead, those cases involved a union's failure to act, usually by failing to perform a ministerial function. Moreover, in those cases, the union's failure to act constituted a breach of the duty of fair representation because the failure was either unexplained, unsupported by any rational basis or otherwise inexcusable. Thus, to the extent that the Seventh Circuit's standard is different than the standards of other courts, the difference in standards is not implicated in this case.

A review of the cases on which Petitioners rely makes this clear. In *Dutrisac*, the union failed to appeal plaintiff's grievance to arbitration on time. The union was held liable "for a total failure to act that is unexplained and unexcused." 749 F.2d at 1273. In *De Arroyo*, the union made no investigation or determination as to the merits of plaintiffs' grievances and offered no rational explanation for its failure to press them. In finding that the union breached its duty, the court noted that the union's defense might be well taken if there were "any rational basis" for its actions. 425 F.2d at 284 n.4. In *Ruzicka I*, the union's failure to meet an appeal deadline was found to state a claim for breach of the union's duty. However, in *Ruzicka II*, the Sixth Circuit modified its earlier ruling and held that if the failure could be explained, as by reliance on a past practice of flexible deadlines, no breach of the duty occurred. 649 F.2d at 1211.[8] Only "unexplained union inaction which substan-

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[8] Petitioners also cite *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), and *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972). In *Farmer*, the court, in connection with findings of pervasive sex discrimination in the negotiation and implementation of

tially prejudices a member's grievance" can violate the union's duty. *Id.*; *see also Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354, 359 (8th Cir. 1985), *cert. denied*, 108 S.Ct. 293 (1987) (ignoring clearly meritorious grievance without explanation is ground for breach of duty).

These cases do not involve allegations against a union that has acted based on its reasoned interpretation of contractual language. The Sixth Circuit explicitly recognized in *Ruzicka II* that the arbitrary conduct standards developed in the two *Ruzicka* decisions do not apply to cases where the union's reasoned judgment on the merits of a grievance was at issue. In fact, the court reaffirmed its holding in earlier cases that proof of bad faith is required to support a claim for unfair representation "where the union in question had made a decision that the individual's grievance was without merit." 649 F.2d at 1212, *citing Dill v. Greyhound Corp.*, 435 F.2d 231, 238 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

Those circuits that have addressed the issue agree with the Sixth Circuit that where the union has made a reasoned judgment based on its interpretation of the contract, the judgment will not be overturned absent evidence of bad faith. *Medlin v. Boeing Vertol Co.*, 620 F.2d 957,

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sex-segregated classifications, held that the union violated its duty to fairly represent women employees who unsuccessfully attempted to move into the male dominated classifications. In *Griffin*, the court held that the union breached its duty by inexplicably filing plaintiff's grievance with the very supervisor plaintiff had been terminated for assaulting, where there was evidence that "the Union's handling of the grievance [was] motivated by bad faith" based on the bargaining chairman's personal friendship with the supervisor. 469 F.2d at 185. Although these cases refer to a right of action based on arbitrary conduct without evidence of bad faith, they both involve bad faith and/or discriminatory conduct which could support a finding of breach of the duty under any circuit's standards.

961 (3d Cir. 1980); *Bazarte v. United Transportation Union*, 429 F.2d 868, 872 (3d Cir. 1970); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1397 (5th Cir. 1983); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir. 1978); *Augspurger v. Locomotive Engineers*, 510 F.2d 853, 859 (8th Cir. 1975); *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1245 n.9 (8th Cir.) (*en banc*) *cert. denied sub nom. United Steelworkers v. Smith*, 449 U.S. 839 (1980); *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988).

The standard of review recently articulated by the Ninth Circuit in *Moore v. Bechtel Power Corp.* harmonizes the decisions of that circuit and others by recognizing a distinction between ministerial errors and errors of judgment. As the court stated:

> In our application of this doctrine, we ask first whether the act in question involved the union's judgment, or whether it was procedural or ministerial. If it is a union's judgment that is in question, . . ., the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling. [Citations omitted]

840 F.2d at 636. Moreover, arbitrariness does not mean negligence but rather "reckless disregard" of employee rights.[9] Finally, the court noted that in all its cases find-

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[9] All circuits require more than negligence or poor judgment to prove a breach of the union's duty. *Condon v. United Steelworkers Local 2944*, 683 F.2d 590, 594 (1st Cir. 1982), ("negligence does not constitute a breach" and "arbitrary or discriminatory treatment" requires proof that union's conduct was "intentional, invidious, and directed at" plaintiff); *NLRB v. Teamsters, Local 282*, 740 F.2d 141, 147 (2d Cir. 1984) (requires proof of union omissions that are "so egregious, so far short of minimum standards of fairness . . . and so unrelated to legitimate union objectives as to be arbitrary"); *Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3d

ing a breach of duty based on arbitrary conduct it had found

> that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment, and that there was no rational and proper basis for the union's conduct.

Id. Citing Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

This formulation of the standard for review of duty of fair representation cases harmonizes the decisions in *De Arroyo*, *Ruzicka I* and *Dutrisac*, on which Petitioners rely, with the result reached by the Seventh Circuit in this case. Unlike the cases relied on by Petitioners, this case does not involve an unexplained failure to act by the Union, but rather turns on an exercise of judgment concerning the merits of Petitioners' grievances based on its reasoned interpretation of the contract.

The Seventh Circuit expressly rejected petitioners' claim that the record supports a finding that the Union

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Cir. 1980) (bad faith required); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980) (union actions must be "so indifferent to member's rights," "so grossly deficient" as to rise to "culpability"); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1397 (5th Cir. 1983) (bad faith required); *Ruzicka II*, 649 F.2d at 1212 (Sixth Circuit requires "reckless disregard"); *Ethier v. U.S. Postal Service*, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979) ("inexplicable" union conduct may violate its duty); *Robesky v. Quantas Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978) ("egregious" conduct required); *Foust v. IBEW*, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979) (approved jury instruction requiring "gross nonfeasance" and "hostile discrimination in arbitrarily and capriciously" refusing to file timely grievance); *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1207 (11th Cir. 1982) ("reckless disregard" of employee rights or "grossly deficient" union conduct required). Any deficiencies in the Union's conduct in this case, even if not based on matters of judgment, do not rise to the level of egregious or reckless conduct required by the circuits.

"deliberately and unjustifiably failed to represent" them. As the Court found, the record shows:

> that Rodgers refused to pursue plaintiffs' 1984 grievance request because he believed the union had no sound basis for submitting grievances in view of the restrictive language in the preferential hire agreement that gave Budd sole discretion to establish 'local plant hiring eligibility requirements' and to reject employees on the basis of these local standards; and that Rodgers sat on plaintiffs' 1985 grievance request because he had investigated plaintiffs' identical claims of contractual violations a year earlier and found that, given the language of the preferential hire agreements, they were without support.

836 F.2d at 433. Thus, the Union's actions were dictated by its reasoned interpretation of the preferential hire provisions in the contract. Under the Union's interpretation, the Company had unlimited discretion to establish local hiring eligibility requirements and to exclude any employee who did not meet those requirements. This interpretation was consistent with the language of the agreement and with recent bargaining history. Given this interpretation of the contract, the Union reasonably concluded that it had no basis for challenging hiring decisions by the Company reached through application of its discretionary hiring requirements. Accordingly, the court found, and the record showed, that the Union's actions were based on an evaluation of the merits of plaintiffs' grievances consistent with its reasoned interpretation of contractual language.[10]

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[10] As the court found, the record in this case was devoid of any evidence of bad faith or hostility toward any plaintiff. While the court noted that the record established that Rodgers in evaluating Petitioners' grievances did not independently verify the information supplied by the Company, this failure amounted *at most* to "inferior representation." The record did not disclose any reason for Rodgers to question the Company's records nor did any Petitioner present evidence that the records were erroneous. Thus, Petitioners have never made clear what a more thorough investigation could

To the extent the Seventh Circuit has departed from other circuits in its review of duty of fair representation cases, the departure involves cases where the union fails to perform a ministerial act. *See Hoffman v. Lonza*, 658 F.2d at 521; *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d at 779. Unlike other circuits, the Seventh Circuit will not even consider a finding of breach of the duty where union conduct is unintentional. However, the split on this issue applies only to a "narrow range of cases" involving "unexplained union inaction." *Ruzicka II*, 649 F.2d at 1211. This is not such a case.

Moreover, the circuits are in accord that something more than negligence is required, and those that recognize unintentional breaches require irrational conduct or reckless disregard for employee rights. The Seventh Circuit, in this case, suggests that some form of irrational conduct might support a finding of breach of the union's duty within the Seventh Circuit's standard, but that a finding of irrational conduct is not supported by the record here. Thus, the court observes in a footnote to its decision:

> Where a contract guarantees representation, an egregious and flat out refusal to represent has the effect of cancelling the contractual guarantee. *Hoffman* does not (and could not consistent with congressional policy) bar review of an egregious failure to represent contractual rights. Such a failure is neither alleged here nor disclosed by the record.

Slip Op. at 11 n.2. In an earlier case, the Seventh Circuit further suggested that in a proper case "reckless" conduct

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have revealed that would have altered the Union's evaluation of their grievances in view of the Union's interpretation of the contract as affording the Company an unfettered right to reject employees for preferential hire by application of its own local hiring requirements. Accordingly, this case does not fall within the class of cases where an unexplained failure to investigate evidenced a breach of the union's duty. Here the scope of investigation afforded plaintiffs was consistent with the scope of the rights conferred by the contract as construed by the Union.

could be sufficient to support an inference of bad faith and a finding that a union breached its duty. *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d at 778. It appears, then, that the difference in the Seventh Circuit's approach may not lead to different results from those of other circuits were the court presented with a clear case of an irrational or unexplained failure to act by the union which severely prejudiced an employee's contractual rights.

The petition for *certiorari* should be denied because the result reached by the Seventh Circuit in this case does not conflict with the decisions of other circuits. The Union's decision not to pursue Petitioners' grievances was based on a good faith reasoned interpretation of the governing contractual provisions. Accordingly, it does not violate the Union's duty of fair representation under this Court's decision in *Vaca v. Sipes* or under decisions in other circuits applying Supreme Court precedent. To the extent the circuits are split, the disagreement concerns liability for unintentional conduct involving an unexplained failure to act. The facts of this case do not present a situation which implicates this disagreement.

II. Petitioners' Challenge To The Statute Of Limitations Ruling Of The Seventh Circuit Does Not Raise An Important Question Warranting Grant Of The Petition For Certiorari.

The statute of limitations for hybrid breach of contract duty of fair representation actions is the six-month limitations period in § 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b). *Del Costello v. Teamsters*, 462 U.S. 151 (1983). Under this authority, the Seventh Circuit held that Petitioners' claims relating to applications and requests for grievances made in 1983 and 1984, more than six months before their complaint was filed, were barred by the applicable statute of limitations. The court further held that only Petitioners' 1985 applications and related grievances could be considered

in deciding whether the employer violated the contract and the union breached its duty of fair representation.

In rejecting Petitioners' 1983 and 1984 claims as time-barred, the court relied on its decisions in *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) and *Ray Lewis v. Local Union 100*, 750 F.2d 1368 (7th Cir. 1984). *Metz* held that "continued union inactivity after an initial failure to respond to a grievance request does not violate the duty of fair representation." (846 F.2d at 433) *Lewis* held that, even if a violation is continuing, "only complaints based upon conduct occurring within the six-month period preceding the filing of the complaint are timely." (*Id.*)

Petitioners' challenge to this part of the court's decision is based on their disagreement with the Seventh Circuit's interpretation of its own precedent and on its application of circuit precedent to the facts of this case. Petitioners do not suggest that the Seventh Circuit's decision on this issue conflicts with any decision of the Supreme Court or of another court of appeals. The decision merely applies circuit precedent to a particular fact situation. There is no important question of federal law implicated in the court's application of the statute of limitations in this case which warrants the exercise of the Court's jurisdiction on a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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